Supreme Court, U.S.
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In The

Supreme Court of the United States

DON WALTON,

Petitioner,

v.

TESUQUE PUEBLO et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) precludes federal review, other than *habeas* review pursuant to 25 U.S.C. 1303, of deprivations without due process of law by Indian tribes of liberty or property of non-tribal persons.

2. Whether, on a 12(b)(1) challenge to *habeas* jurisdiction under 25 U.S.C. 1303, hotly disputed facts may be resolved against the party opposing the challenge absent a fact inquiry.

3. Whether 25 U.S.C. 450f(c) of the Indian Self Determination and Education Assistance Act (ISDEAA) requiring the waiver of sovereignty defenses in insurance coverage for the benefit of third parties aggrieved by ISDEAA-funded agencies; 25 U.S.C. 450*l*(c) [ISDEAA Model Contract] (b)(13) requiring that the laws, policies and procedures of the contractor shall provide for administrative due process or its equivalent; or 25 U.S.C. 450*l*(c) [ISDEAA Model Contract] (c)(5) requiring a forum for grievances brought by program beneficiaries are operative.

PARTIES TO THE PROCEEDINGS

Petitioner is Don Walton, an individual.

Defendant Tesuque Pueblo is a federally recognized Indian tribe. Defendant Tesuque Pueblo Flea Market is an agency of the tribe. Defendant Tesuque Tribal Court is an agency of the tribe and a federal contract agency. Defendants Marvin Herrera, Clarence Coriz, Norbert Leno, Michael Albert Vigil, Harold Samuel, Gary Moquino, Allen Duran, Robert Dorame, Jr., Clifford Moquino and Duane Silva are officers of the tribe sued in their individual and official capacities.

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OPINION BELOW

Walton v. Tesuque Pueblo, ___ F.3d ___ (10th Cir. 2006)

JURISDICTION

(i) The judgment or order sought to be reviewed was entered April 10, 2006.

(ii) The order denying rehearing was entered June 14, 2006.

(iii) The Supreme Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Amendment 5 [pertinent part]

No person shall be . . . deprived of life, liberty or property without due process of law. . . .

25 U.S.C. 450f(c)(3)(A)

Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or

otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

25 U.S.C. 450*l*(c) [Model Contract] (c)(5)

Fair and uniform services – the Contractor shall . . . provide access to an administrative or judicial body empowered to adjudicate or otherwise resolve complaints, claims, and grievances brought by program beneficiaries against the Contractor arising out of performance of the Contract.

25 U.S.C. 450*l*(c) [Model Contract] (b)(13)

Pursuant to the Indian Civil Rights Act of 1968 (25 U.S.C. 1301 *et seq.*), the laws, policies and procedures of the Contractor shall provide for administrative due process (or the equivalent of administrative due process) with respect to the programs, services, function, and activities that are provided by the Contractor pursuant to this Contract.

25 U.S.C. 1302 [pertinent part]

No Indian tribe in exercising powers of self government shall –

. . . .

(8) . . . deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder. . . .

25 U.S.C. 1303

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to

test the legality of his detention by order of an Indian tribe.

42 U.S.C. 1981

(a) Statement of equal rights.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. 1985 [pertinent part]

(3) If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . . ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, and act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of

damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. 1988

(a) **Applicability of statutory and common law.** The jurisdiction in civil and criminal matters conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adopted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Tesuque Tribal Resolution #1999-03-03 [pertinent part]

FLEA MARKET RULES AND REGULATIONS

WHEREAS, The Pueblo of Tesuque is a federally recognized sovereign Indian Tribes;

WHEREAS, The Pueblo of Tesuque has from time immemorial exercised its inherent rights and powers of self-government as a sovereign Nation;

WHEREAS, The Pueblo of Tesuque Tribal Council is vested with the authority and duty to provide for the protection of the health, safety, welfare, security and property of its agencies, businesses, tribal members, residents, guests, and visitors;

WHEREAS, The Pueblo of Tesuque Tribal Council assumed management and operation of the Tesuque Pueblo Flea Market on the 1st day of July, 1998, in addition to its ownership of the Flea Market business;

WHEREAS, The Pueblo of Tesuque Tribal Council sees a paramount need to establish rules and regulations governing the operation and management of the Tesuque Pueblo Flea market;

WHEREAS, The Pueblo of Tesuque Tribal Council has established the Tesuque Pueblo Flea Market Management to oversee the operation, management and maintenance of the business;

NOW WHEREBY, The Pueblo of Tesuque Tribal Council hereby establishes the Tesuque Pueblo Flea Market vendor Rules and Regulations. . . .

. . . .

NOW THEREFORE BE IT RESOLVED THAT, THE TESUQUE PUEBLO FLEA MARKET VENDOR RULES AND REGULATIONS BE HEREBY ESTABLISHED AND SHALL BECOME EFFECTIVE THE DATE OF THIS RESOLUTION.

BE IT FURTHER RESOLVED THAT, THE ABOVE STATED RULES SHALL BE INCORPORATED INTO THE TESUQUE PUEBLO FLEA MARKET VENDOR PERMIT AGREEMENT AND ALL VENDOR PERMIT

HOLDERS SHALL COMPLY WITH ALL RULES AND REGULATIONS.

BE IT FURTHER RESOLVED THAT, THE PUEBLO OF TESUQUE RESERVES THE RIGHT TO AMEND, ADD, DELETE AND TERMINATE ALL TESUQUE PUEBLO VENDOR PERMITS AT ANY AND ALL TIMES, PURSUANT TO THE AUTHORITY OF THE PUEBLO OF TESUQUE TRIBAL COUNCIL.

[2002 REGULATIONS OF THE TESUQUE PUEBLO FLEA MARKET] [Repealed]

[Part IV. Procedures. Repealed]

[2. Issuance of Civil Citations: Upon its receipt of a report alleging a violation of these regulations, the Management shall conduct an investigation to determine whether a violation has occurred. If Management determines that a violation has occurred or if the Management observes a violation directly, the management may issue a verbal warning or written Civil Citation to the offending party. The Citation shall contain the name, mailing address of the offending Party, a brief description of the allegedly was committed, and shall indicate that, within seven (7) days of the date the Citation was issued, the Offending Party may request in writing an administrative hearing before the management to challenge the facts alleged in the Citation.]

[APPEALS FROM DECISION OF THE MANAGEMENT] [Repealed]

2003 REGULATIONS OF THE TESUQUE PUEBLO FLEA MARKET
PART III. PROHIBITED ACTIVITIES AND CIVIL SANCTION

2. GENERAL CIVIL SANCTIONS:

c.

iii. immediate removal of the person(s) or vendor(s) from the Flea Market.

6. EXCLUSION: In addition to any other civil sanction(s) authorized by these regulations, any person that violates these regulations may be excluded from the Flea Market and/or Pueblo Lands in accordance with the Pueblo Laws; provided that members of the Pueblo shall be exempt from such regulations.

ITEMS NOT LISTED or FOUND IN THESE RULES AND REGULATIONS CAN BE DELETED OR ADDED AT ANY TIME, AT THE DISCRETION OF the FLEA MARKET MANAGEMENT.

Tesuque Tribal Resolution #10/102-1022 [*Walton v. Pueblo* barred] [pertinent part]

NOW, THEREFORE, BE IT RESOLVED THAT, The Pueblo of Tesuque Tribal Council hereby establishes that the Pueblo possesses and enjoys sovereign immunity and has not waived it by Resolution, tribal law or any other lawful authority or document. The tribe asserts that sovereign immunity bars the suit pending in tribal court captioned Walton v. Tesuque Pueblo, Case No. CV-03-137.

STATEMENT OF THE CASE

Tesuque Pueblo is an Indian reservation contiguous to the city of Santa Fe, New Mexico, roughly equal in geographic area but startlingly different in form of government. The Pueblo is a theocracy governed by a religious official, the *cacique*, who appoints all other officers of the executive, judicial, and legislative branches and at whose pleasure they serve. Strict division of governmental function is not observed. The tribal council, for instance, sits as the tribal court of appeals. Regulations promulgated by the tribal council for the Tesuque Pueblo Flea Market, a tribal enterprise at the boundary of the reservation adjoining the Santa Fe Opera, grant the market Manager quasi-judicial powers to impose punishments on vendors from which there is no appeal. The range of punishment includes, for non-Native vendors, exclusion from Pueblo lands.

For fourteen years Don Walton, an anglo (non-Indian) vendor operated Big Don's Trading Company at the Tesuque Pueblo Flea Market. He lived on the Pueblo for seven of those fourteen years. On May 8, 2003, with his tribal vendor's license current and his rent paid in advance, he was shocked with eviction, forcible removal from his business premises and exclusion from the territory of the Pueblo, all without prior notice or opportunity to be heard, on an uninvestigated charge of "racism to a fellow vendor."

Mr. Walton's search for a hearing began.

The former tribal administrative remedy providing administrative due process (bracketed excerpt from 2002 Flea Market Rules and Regulations set forth *supra*) had been abolished in January, 2003, when the flea market

manager was also granted the power to issue indefinite expulsions from the Pueblo. (Judge Brack's district court opinion, while it did not rely on the supposed fact, is incorrect in its statement that an administrative remedy was available to Walton. The 2003 overhaul removed every vestige of due process. Judge Duran's Tesuque Tribal Court opinion states the matter correctly at App. 38. See also App. 52.) With an administrative remedy unavailable, Walton sought his hearing in Tesuque Tribal Court.

The theocratic Tesuque Tribal Court whose judge serves at the pleasure of the *cacique* is a federal contract agency funded pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. 450 *et seq.* See *Pourier v. U.S.*, 138 F.3d 1267 (8th Cir. 1998) (ISDEAA employees are federal contract agents.) The Tribal Court was asked first, to provide Mr. Walton a merits hearing pursuant to tribal customary due process, and second, only in the event there was no tribal tradition of notice and hearing prior to imposition of severe penalty, to apply the federal protections extended to persons in Mr. Walton's position.

While Mr. Walton's case was pending before the Tesuque Tribal Court, the tribal council passed a "Resolution on Tribal Sovereignty" barring it by name. The Tesuque Tribal Court thereafter denied a merits hearing, App. 25-41, and the tribal council sitting as court of appeals forthwith denied appeal, App. 23-24.

Tribal remedies exhausted, Walton sought a federal forum, invoking the court's federal question and habeas jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 2241, citing 42 U.S.C. 1981, 1985, and 1988, 25 U.S.C. 1302(8) and 1303, and (having learned that the Tesuque Tribal

Court was an ISDEAA program) the rarely invoked due process and waiver of defense provisions of the ISDEAA at 25 U.S.C. 450f(c), 450*l*(c) [Model Contract] (c)(5), and 450*l*(c) [Model Contract] (b)(13).

Defendants moved pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss all counts as barred by tribal sovereignty, citing *Santa Clara v. Martinez*, 436 U.S. 39 (1978).

The federal district court for the District of New Mexico denied the Defendants' motion to dismiss on the basis of *Dry Creek Lodge Inc. v. U.S.*, 515 F.2d 926 (10th Cir. 1975) (*Dry Creek I*), 623 F.2d 682 (10th Cir. 1980) (*Dry Creek II*), *cert. den.*, 449 U.S. 1118, 66 L.Ed.2d 847, 101 S.Ct. 931 *sub nom. Shoshone & Arapahoe Tribes v. Dry Creek Lodge, Inc.* (1981), *reh. den.*, 450 U.S. 960, 67 L.Ed.2d 385, 101 S.Ct. 1421 (1981).

At the same time, however, finding the hotly contested fact of Petitioner's banishment against Petitioner without a fact hearing as Petitioner requested, the district court dismissed his petition for writ of *habeas corpus* pursuant to 25 U.S.C. 1303.

It also denied his claim to a due process forum pursuant to 450*l*(c) [Model Contract] (c)(5) and 25 U.S.C. 450*l*(c) [Model Contract] (b)(13) and dismissed his claim that the Pueblo had waived immunity pursuant to the separate insurance contract mandated at 25 U.S.C. 450f(c)(1), all on the basis of *De Montiney v. United States, et al.*, 255 F.3d 801 (9th Cir. 2001).

Defendants appealed the finding of *Dry Creek* jurisdiction to the Tenth Circuit under the doctrine of *Cohen v. Beneficial Indus. Loan Corp*, 337 U.S. 541, 546 (1949).

Walton cross-appealed his inextricable intertwined dismissed jurisdictional claims.

The Circuit sustained the appeal and denied the cross appeal.

These are the underlying facts:

Walton is a Wyoming cowboy and Vietnam combat veteran, neighboring vendor Ismail Abayhan an ethnic Chechen who translated Ayatollah Khomeini for Iran's Turkish embassy in the first year of the Islamic Republic. In the early days of the Iraq war, Abayhan was amused by the comment of Iraqi foreign minister Tariq Azis that troops expecting flowers thrown at them were getting bullets thrown at them. Walton took it as laughing at American service personnel under fire and stopped talking to his neighbor. After two weeks of silent treatment Abayhan denounced Walton to the Manager. The new Manager was from another tribe, may have had Walton confused with another cowboy and apparently didn't even read the entire denunciation, only the heading of which speaks to "racism." See App. 54-55, 59-67.

Abayhan, like Walton, is Caucasian. His deposition, included in the Appendix of materials needed to understand the issues, was taken by agreement of counsel in the tribal court case in a brief period after the tribal defendants were dismissed for sovereign immunity and before Abayhan was peremptorily dismissed by a new tribal judge.[1] It was produced to all parties and listed in the proposed Initial Pre-Trial Report circulated to Defendants

[1] Walton appealed that ungrounded dismissal to the tribal council as well. His appeal has been pending for two years with no action.

but not filed because Defendants chose that day to take their *Cohen* doctrine appeal.

REASONS FOR GRANTING THE WRIT

1. It goes against all civilized norms that after fourteen years of honest effort Don Walton should be banished and have his business seized without ever being allowed an opportunity to confront the charges. That is not supposed to happen in America. The question presented is whether and to what extent due process of law obtains for non-Indian Americans in Indian country today.

The seminal modern Supreme Court decision on civil rights in Indian country, *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) does not consider the issue of non-Natives, on whose rights the circuits differ. See, e.g., *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), finding jurisdiction under 42 U.S.C. 1981 (pled by Petitioner but not addressed by the panel below). Ever increasing economic ties and general intercourse between Indians and non-Indians cry out for authoritative resolution of this basic question.

The issue of civil rights of Indians *vis a vis* tribal governments first arose in *Talton v. Mayes*, 163 U.S. 376 (1896), decided in the same term as *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("separate but equal") by a Court that was clearly not attuned to modern concepts of civil rights. Reasoning that tribal governments are not federal, the Court declined to extend federal *habeas* to a prisoner on Cherokee death row.

At the beginning of the modern civil rights era, the federal district court in *Toledo, et al. v. Pueblo of Jemez, et al.*, 119 F.Supp. 429 (D.C. N.M. 1954) brought similar analysis to a civil action by tribal members complaining of interference with their free exercise of religion. The court held that the powers of Jemez Pueblo over its members did not derive from hence were not limited by the Constitution of the United States in the various dispossessions and other punitive measures visited on complainants.

Without then making any inquiry into what were actually and traditionally the powers of Jemez Pueblo over its members, the *Jemez* court simply imposed a rule of English common law sovereign immunity from suit.

Jemez was roundly criticized by commentators including the dean of American Indian law, Felix Cohen, who saw it as illustrating an "anomaly." Felix Cohen, *Federal Indian Law*, "Special Groups and Laws: Pueblos of New Mexico," (Association on American Indian Affairs, 1966 ed., reprinting U.S. Department of Interior 1958 ed.), at 916. "Interposed Federal power which forecloses the operation of state law yet affords little or no protection of rights of individual Indians is graphically demonstrated." Cohen, 917. (Cohen's treatise has been posthumously rewritten and the criticism eliminated along with the entire chapter on the Pueblos. Little if anything of Felix Cohen remains in the current edition of the work that bears his name.)

In response to *Jemez* and its ilk, Congress voted to extend basic civil rights to Indian country through the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.* (ICRA).

Santa Clara v. Martinez, 436 U.S. 39 (1978) overruled several circuits to hold that while the ICRA extended civil rights to Indian country, a tribal member seeking to enforce equal protection against her tribe could do so only through tribal institutions, because Congress in ICRA had not explicitly provided a federal remedy other than the *habeas* remedy in 25 U.S.C. 1303. The Court noted that Martinez (a Santa Clara woman who married outside the tribe seeking membership for her children) had access to political as well as judicial machineries of her tribe and that membership determinations are utterly central to sovereignty.

The *Santa Clara* majority did not specifically address the question of whether non-Indians have civil rights enforceable in the federal court where, as here, the sovereign immunity of an Indian tribe is interposed to cover up deprivations of liberty or property without due process of law.

In *National Farmer's Union Ins. v. Crow Tribe*, 468 U.S. 1315 (1985), Chief Justice Rehnquist, who joined in *Santa Clara*, opined that the question of federal jurisdiction for non-Indians remained open.

In *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), the Ninth Circuit held 42 U.S.C. 1981, 1985 and 1988 applicable in Indian country. 42 U.S.C. 1981, 1985 and 1988 were raised in this case but not passed on; the panel simply ignored them. The law of the Tenth Circuit should be harmonized with the law of the Ninth Circuit.

The law of the Tenth Circuit is anomalous. In the pre-*Santa Clara* era, *Dry Creek I* was a leading authority on the substantive limitations ICRA imposed on tribal government: no longer could a defense of sovereignty

immunize deprivations of liberty or property without due process of law. After *Santa Clara*, the *Dry Creek* defendants renewed their jurisdictional challenge. In *Dry Creek II* the circuit ruled that *Santa Clara* did not absolutely foreclose federal review for civil rights of non-Indians. *Certiorari,* which three Justices would have granted, was denied by this Court and rehearing was likewise denied.

But the circuit has never again followed *Dry Creek II.* Instead, panels consistently rule that *Dry Creek II* is not to be relied on. The case is no longer collected in West's USCA. In fact, the reversed portion of the district court opinion in this case is the only time *Dry Creek II* has ever been affirmatively followed.

The undecided issue of civil rights of non-Indians in Indian country, on which the circuits differ, affects a large and ever increasing number of citizens, and it remains for this court to declare.

2. In addition to implicit statutory and common law federal civil rights jurisdiction, Walton sought jurisdiction under the explicit grant of the *habeas* remedy in 25 U.S.C. 1303.

Walton made his life with the Tesuques for more than a decade before he suffered exclusion by the reflexive action of an insecure racism-obsessed manager and the tribe's follow-on equally reflexive defense against a perceived threat to sovereignty. As in *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), the banishment severely infringes Petitioner's liberty.

In fact, Walton was actually, physically removed from the reservation, not once but twice, an indignity with which the *Poodry* plaintiffs were only threatened. The

court below was not impressed because Walton had not since returned to be rearrested. Compare *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495 (10th Cir. 1995). As the Tenth Circuit recognized in that context but not here, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights," citing *Babbitt v. Farm Workers*, 442 U.S. 289 (1979) quoting *Steffel v. Thompson*, 415 U.S. 452 (1974).

Habeas jurisdiction was denied Walton on a 12(b)(1) challenge that relied entirely on a self-serving letter, App. 68, signed by litigation counsel and manifestly created for purposes of litigation, opining that only the tribal council has banishment power under tribal procedures.[2] The letter is flatly contradicted not only by the subsequent evidentiary declarations and affidavits of Walton but by the Tribal Council Authorizing Resolution authorizing the Rules and Regulations of the Flea Market and the tribe's 2003 Rules describing the powers of the Flea Market manager:

> **2. GENERAL CIVIL SANCTIONS:**
>
> c.
>
> iii. -immediate removal of the person(s) or vendor(s) from the Flea Market.
>
> **6. EXCLUSION:** In addition to any other civil sanction(s) authorized by these regulations, any

[2] The letter speaks of "our" conversation – i.e., the conversation between lawyers, since there was no conversation with the Pueblo client. The Pueblo governor is a ceremonial official appointed by the *cacique* for a one year term.

> person that violates these regulations may be excluded from the Flea Market and/or Pueblo Lands in accordance with the Pueblo Laws; provided that members of the Pueblo shall be exempt from such regulations.

The issue is not that the court below got the facts wrong but that it did so without the inquiry Walton sought. The Court should reaffirm the rule in *Land v. Dollar*, 330 U.S. 731 (1947). If an assertion in a lawyer's letter can without inquiry elevate itself into an irrebuttable fact denying jurisdiction, whether under FRCivP 12(b)(1) or any other rule, then there is no justice. *Habeas* jurisdiction should not be so easily shed where there is no other avenue to a forum.

3. The majority of governmental programs formerly administered by the federal Bureau of Indian Affairs and Indian Health Service are now administered by the tribes themselves acting as federal contract agencies pursuant to the Indian Self Determination and Education Assistance Act, 25 U.S.C. 450 *et seq*. The contracting scheme, in its infancy in 1978 and never considered by the *Santa Clara* court, encompasses the Tesuque Tribal Court.

When the tribe's ISDEAA court refused to recognize due process as a limit on tribal sovereignty, it breached Petitioner's rights as third party beneficiary of the ISDEAA contract.

ISDEAA was enacted at a time when federal jurisdiction over ICRA claims was the law of several circuits and generally presumed to be the law. See Senate Report 93-682, Appendix A, Letter of August 1, 1973 from Solicitor Kent Frizzell, responding to a query from Senate committee chair Henry M. Jackson in connection

with a USDC-NM ruling that ICRA suspended tribal immunity and the tribe further waived immunity by contracting:

> The Indian Civil Rights Act of 1968, 25 U.S.C. 1301-1303, represents a second Congressional waiver of tribal immunity. Unlike section 17 of the Indian Reorganization Act, the Civil Rights Act permits a court to review tribal governmental actions. Although the Civil Rights Act specifically grants only habeas corpus jurisdiction to the federal courts, **it appears settled** that the Courts feel free to fashion any appropriate remedy.

Senate Report 93-682, at 49-50. (Emphasis supplied.)

The three ISDEAA provisions on which Plaintiff relies are clear and explicit waivers of tribal sovereignty for purposes of lawsuits like Plaintiff's. They represent a balancing determination by Congress between the presumed reach of ICRA as of 1975 and the rollback sought by certain tribes and achieved three years later in *Santa Clara*. They give Plaintiff ample basis to seek a federal remedy. It is not required that Congress use a particular form of words or make a specific literal reference to waive tribal immunity. *Osage Tribal Council v. United States Dept. of Labor*, 187 F.3d 1174 (10th Cir. 1999).

Relying on the holding in *Cherokee v. Leavitt*, 125 S.Ct. 1172 (2005) that ISDEAA contracts are real contracts, interpreted according to normal contract law, Plaintiff does not accept that *De Montiney*, a case considering the claim of an ISDEAA subcontractor to a jurisdictional provision reserved exclusively to the contractor itself, resolves the question of a third party beneficiary

seeking to enforce contract provisions clearly enacted for his benefit.[3]

If the provisions plainly designed to give rights to third party litigants cannot be enforced by those litigants, they are without meaning, surplus verbiage in the Congressional enactment. The courts should not without deeper analysis send the work of Congress down the drain. *De Montiney* no more resolves the issue of third party beneficiaries than *Santa Clara* resolves the issue of non-Indians.

4. There is another great reason the Court should hear this matter. With or without gaming, Native America remain the most impoverished, underserved segment of American society, with health, education and longevity below those of any other group. See, e.g., "A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country," U.S. Commission on Civil Rights, July 2003; "Income, Poverty, and Health Insurance Coverage in the United States: 2005," U.S. Census Bureau, August, 2006. The lack of normal standards of law, discouraging legitimate enterprise, is a significant factor contributing to the plight of Indian country. The affirmation of basic legal norms would contribute to alleviating a national disgrace.

Don Walton's case presents fundamental commercial and civil liberties issues that under the Constitution and laws of the U.S. *or any other rule of law* should not be nullified by an invocation of sovereign immunity. Neither should mercantile obligations be set aside by act of state, nor should banishment be a first resort in the mercantile

[3] Petitioner's counsel was on the amicus brief of *Ramah* class representati[illegible]n support of the tribe in *Cherokee*.

setting. The Indian nations within the boundaries of the United States need not observe the same legal standards as other governmental entities but their sovereignty in respect to commercial enterprise with non-tribal members should not trump fundamental rights. Due process is not merely a quaint Anglo custom. The right to notice and hearing before imposition of penalty is the essence of the rule of law from the Code of Hammurabi to the Universal Declaration of Human Rights, and the framers of the United States Constitution held it natural law.

Petitioner cites *Franconia Associates et al. v. United States*, 536 U.S. 129 (2002) (U.S. must cut square corners in its commercial dealings), *United States v. Winstar*, 518 U.S. 839 (1996) (same), and *Cherokee v. Leavitt*, 125 S.Ct. 1172 (2005) (ISDEAA contracts are no different from other contracts in regard to the binding nature of contractual obligation). It is beneficial to the American government to be held to a standard. The Indian nations deserve the same.

CONCLUSION

For the foregoing reasons, Petitioner prays this Court grant his Petition for Writ of Certiorari to the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DON WALTON,

Plaintiff-Appellee-
Cross-Appellant,

v.

TESUQUE PUEBLO; TESUQUE PUEBLO FLEA MARKET; MARVIN HERRERA, individually and in his official capacity as Governor of Tesuque Pueblo; CLARENCE CORIZ; NORBERT LENO; MICHAEL ALBERT VIGIL; HAROLD SAMUEL; GARY MOQUINO; ALLEN DURAN; ROBERT DORAME, JR.; CLIFFORD MOQUINO, individually and in their official capacities as Tribal Councilors of Tesuque Pueblo; DUANE SILVA, individually and as an officer of Tesuque Pueblo; TESUQUE TRIBAL COURT; TESUQUE TRIBAL CONTRACTORS, 1-10,

Defendants-Appellants-
Cross-Appellees.

No. 04-2305 & 04-2310

JICARILLA APACHE NATION; THE NAVAJO NATION; THE UTE MOUNTAIN UTE TRIBE; THE PUEBLO OF ACOMA;

THE PUEBLO OF COCHITI;
THE PUEBLO OF ISLETA;
THE PUEBLO OF JEMEZ;
THE PUEBLO OF LAGUNA;
THE PUEBLO OF NAMBE;
THE PUEBLO OF SANDIA;
THE PUEBLO OF SAN JUAN;
THE PUEBLO OF SANTA ANA;
THE PUEBLO OF SANTA CLARA; THE PUEBLO OF SANTO DOMINGO;
THE PUEBLO OF ZIA,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D. Ct. No. CIV-04-236 RB/WDS)

(Filed April 10, 2006)

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Lee Bergen, Bergen Law Offices, LCC, Amicus Curiae for the Pueblo of San Juan.

Before **TACHA**, Chief Circuit Judge, **EBEL**, Circuit Judge, and **CASSELL**, District Judge.[†]

TACHA, Chief Circuit Judge.

[†] The Honorable Paul G. Cassell, District Judge of the United States District Court for the District of Utah, sitting by designation.

Plaintiff-Appellee Don Walton brought this suit against Defendants-Appellants Tesuque Pueblo and various tribal officials (collectively, "tribal defendants" or "defendants") alleging violations of state and federal law after the tribe revoked his flea market vendor's permit. The tribal defendants moved to dismiss for lack of jurisdiction, claiming sovereign immunity barred the action. The District Court denied the motion in part, which the defendants now appeal, and granted the motion in part, which Mr. Walton cross-appeals. We have jurisdiction under 28 U.S.C. § 1291 over the denial of a motion to dismiss based on sovereign immunity. *See Decker v. IHC Hosps., Inc.*, 982 F.2d 433, 435 (10th Cir. 1992). We conclude the District Court erred in determining that it had jurisdiction under *Dry Creek Lodge v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), and therefore, we AFFIRM in part and REVERSE in part.

I. BACKGROUND

The Tesuque Pueblo issued Mr. Walton, a non-Indian, a vendor's permit to sell products at the Tesuque Pueblo Flea Market. After Mr. Walton had an altercation with another vendor, however, Tesuque officials revoked his permit. Mr. Walton then filed suit against the tribal defendants in Tesuque Pueblo Tribal Court. The defendants moved to dismiss for lack of subject matter jurisdiction based on sovereign immunity. Mr. Walton filed a response and the Tribal Court conducted a hearing on the matter. At the hearing, where Mr. Walton appeared and was represented by counsel, the Tribal Court ordered briefing on the issue of immunity and set a date for oral argument. After oral argument – again, Mr. Walton appeared and was represented by counsel – the Tribal

Court granted the motion and dismissed the entire action as barred by sovereign immunity. Mr. Walton appealed the decision to the Pueblo of Tesuque Court of Appeals, which affirmed the Tribal Court.

Mr. Walton then commenced this action in the District of New Mexico. His complaint sought habeas corpus relief and damages for deprivation of liberty and property without due process of law in violation of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 ("ICRA"), as well as damages for breach of contract and various torts. Again, the tribal defendants moved to dismiss for lack of jurisdiction based on sovereign immunity. The District Court granted the motion with respect to Mr. Walton's petition for a writ of habeas corpus but it denied the motion as to the remaining non-habeas claims. It reasoned that although Indian tribes are generally entitled to sovereign immunity under the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), Mr. Walton's lawsuit fell within the narrow exception to *Santa Clara Pueblo* established by this Court in *Dry Creek*, 623 F.2d 682. This appeal followed.

II. DISCUSSION

We review a question of tribal sovereign immunity de novo. *Berrey v. Asarco, Inc.*, 439 F.3d 636, 643 (10th Cir. 2006). Indian tribes possess the same immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo*, 436 U.S. at 58. As with other forms of sovereign immunity, tribal immunity "is subject to the superior and plenary control of Congress." *Id.* Accordingly, absent explicit waiver of immunity or express authorization by Congress, federal courts do not have jurisdiction to entertain suits

against an Indian tribe. *Id.* at 58-59; *Ordinance 59 Ass'n v. United States Dep't of the Interior Sec'y*, 163 F.3d 1150, 1153 (10th Cir. 1998). Mr. Walton argues that the District Court has jurisdiction pursuant to the ICRA, 25 U.S.C. §§ 1301-1303, and pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-450n ("ISDEAA"). We address each statute in turn.

A. The Indian Civil Rights Act

In *Santa Clara Pueblo*, the Supreme Court held that the ICRA does not authorize the maintenance of suits against a tribe nor does it constitute a waiver of sovereignty. *See* 436 U.S. at 59. Further, the ICRA does not create a private cause of action against a tribal official. *Id.* at 72. The only exception is that federal courts do have jurisdiction under the ICRA over habeas proceedings. *Id.* at 58, 70 (citing 25 U.S.C. § 1303) (stating that "the only remedial provision expressly supplied by Congress" is the writ of habeas corpus). These holdings appear to conclusively resolve the jurisdictional issue in this case – at least with respect to Mr. Walton's non-habeas claims – but two years after *Santa Clara Pueblo*, in *Dry Creek*, this Court recognized a limited exception to the rule in *Santa Clara Pueblo*.

In *Dry Creek*, the plaintiffs, non-Indians, sought to build guest accommodations on a tract of land that they owned but that was located within an Arapahoe and Shoshone reservation. 623 F.2d at 684. After obtaining the approval of the reservation's superintendent, the plaintiffs began construction on the Dry Creek Lodge. *Id.* Once the lodge was completed, however, the two tribes' Joint Business Council permitted an Indian family to barricade a

road on the family's property that had been the sole means of access to the lodge. *Id.* Dry Creek Lodge and the other plaintiffs sought relief with the tribal court, but the tribal judge refused to hear their case, stating that "he could not incur the displeasure of the Council" and that he would not do anything without the Council's permission. *Id.* The plaintiffs then sought relief in state court and the case was removed to federal court. *Id.* The tribes moved to dismiss the case as barred by sovereign immunity, but we permitted the suit to go forward in federal district court, reasoning that "[t]here has to be a forum where the dispute can be settled." *Id.* at 685.

Dry Creek has come to stand for the proposition that federal courts have jurisdiction to hear a suit against an Indian tribe under 25 U.S.C. § 1302, notwithstanding *Santa Clara Pueblo*, when three circumstances are present: (1) the dispute involves a non-Indian; (2) the dispute does not involve internal tribal affairs; and (3) there is no tribal forum to hear the dispute. *See Ordinance 59 Ass'n*, 163 F.3d at 1156. Our jurisprudence in this field is circumspect, and we have emphasized the need to construe the *Dry Creek* exception narrowly in order to prevent a conflict with *Santa Clara*. *See id.* at 1157; *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984). Indeed, we have stated that the rule has "minimal precedential value" and in the twenty-six years since *Dry Creek*, with the exception of *Dry Creek* itself, we have never found the rule to apply. *Ordinance 59 Ass'n*, 163 F.3d at 1158-59 (citing *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992)); *Olguin v. Lucero*, 87 F.3d 401, 404 (10th Cir. 1996); *Nero v. Cherokee Nat. of Okla.*, 892 F.2d 1457, 1460 (10th Cir. 1989); *Enterprise Mgmt. Consultants, Inc. v. U.S. ex rel. Hoddel*, 883 F.2d 890, 892 (10th

Cir. 1989); *White*, 728 F.2d at 1309; *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982); *Ramey Const. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 n.4 (10th Cir. 1982).

Here, too, we have no difficulty concluding that the *Dry Creek* exception is inapplicable. The District Court held that Mr. Walton, like the plaintiffs in *Dry Creek*, had no tribal forum to settle the dispute. To the contrary, Mr. Walton successfully availed himself of a tribal forum, although the decision of that tribunal was ultimately unfavorable to him. A tribal court's dismissal of a suit as barred by sovereign immunity is simply not the same thing as having no tribal forum to hear the dispute, *see Olguin*, 87 F.3d at 404 (holding that the third prong of the *Dry Creek* exception is not met when a tribal court has expressly agreed to hear the dispute), and such a ruling would come into direct conflict with *Santa Clara Pueblo*. As such, the District Court erred in concluding it had jurisdiction pursuant to the *Dry Creek* exception over Mr. Walton's non-habeas claims against either the Tesuque Pueblo or its individual officers.

As noted, however, federal courts do have jurisdiction under the ICRA to entertain habeas proceedings. Specifically, 25 U.S.C. § 1303 makes available to any person "[t]he privilege of the writ of habeas corpus . . . , in a court of the United States, to test the legality of his detention by order of an Indian tribe." Nevertheless, the District Court correctly dismissed Mr. Walton's habeas petition because Mr. Walton has not shown a sufficient restraint on liberty

to trigger the application of § 1303.[1] It is clear to us that the expulsion of Mr. Walton, a non-Indian, from the Tesuque Pueblo Flea Market does not constitute a "detention" as that term is used in § 1303.[2] *Cf. Shenandoah v. United States Dept. of the Interior*, 159 F.3d 708 (2d Cir. 1998) (suspended or terminated employment and health insurance, as well lost distributions and prohibitions on speech, are insufficient restraints on liberty to constitute a "detention" under § 1303 and therefore confer jurisdiction).

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[1] The "detention" language in § 1303 is analogous to the "in custody" requirement contained in the federal habeas statute. *Dry v. CFR Court of Indian Offenses for the Choctaw Nation*, 168 F.3d 1207, 1208 n.1 (10th Cir. 1999).

[2] In an affidavit and in his complaint, Mr. Walton also claims that he was banished from the Pueblo itself in July 2003, and that such banishment constitutes a sufficient restriction on liberty to trigger the application of § 1303. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996) (tribe member's banishment from tribal lands sufficient to confer jurisdiction under § 1303). In December 2003, however, the Governor of the Pueblo wrote Mr. Walton a letter clarifying that Mr. Walton had not been banished and was free to enter and traverse the Pueblo. Nothing in the record indicates that Mr. Walton has not been permitted to gain entry to the Pueblo since December 2003. Therefore, we need not determine whether the banishment of a non-Indian from tribal lands constitutes a detention under § 1303 because even assuming it does, Mr. Walton has not shown that he is currently prohibited from entering the Pueblo. *See Maleng v. Cook*, 490 U.S. 488, 491-92 (1989) (habeas petitioner must suffer from "present restraint"); *Broomes v. Ashcroft*, 358 F.3d 1251, 1254 (10th Cir. 2004) (under *Maleng*, "'in custody' language of § 2254 . . . requires habeas petitioners to be 'in custody' under the conviction or sentence under attack when they file the petition."); *see also Radil v. Sanborn W. Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir. 2004) ("Where a party attacks the factual basis for subject matter jurisdiction, the court does not presume the truthfulness of factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts.").

B. The Indian Self-Determination and Education Assistance Act

Mr. Walton also argues that federal jurisdiction exists under the ISDEAA, 25 U.S.C. § 450. The ISDEAA was enacted to promote tribal autonomy by permitting tribes to operate programs previously operated by the United States. *See Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054, 1055 (10th Cir. 2002), *rev'd on other grounds*, 543 U.S. 631 (2005). Mr. Walton relies on § 450f(c) as a source of jurisdiction over his negligence claims. We disagree. Section 450f(c)(1) requires the government to obtain liability insurance for tribes carrying out self-determination contracts[3] entered into under the ISDEAA. In exchange for insurance coverage, the tribe agrees to waive its sovereign immunity with respect to suits arising out of the tribe's performance of its contractual duties. 25 U.S.C. § 450f(c)(3). In this case, however, Mr. Walton is not a party to a self-determination contract and his claims do not arise from any such contract. *See Demontiney v. U.S. Dept. of the Interior*, 255 F.3d 801, 813 (9th Cir. 2001) (no waiver of immunity when plaintiff was not a party to a self-determination contract with tribe). Accordingly, the ISDEAA is not a source of jurisdiction.

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[3] A self-determination contract is defined as:

> [A] contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law. . . .

25 U.S.C. § 450b(j).

III. CONCLUSION

Because Mr. Walton has not demonstrated the unavailability of a tribal forum to hear his dispute regarding the revocation of his vendor's permit, the *Dry Creek* exception to *Santa Clara Pueblo* is inapplicable. We further conclude that the ISDEAA does not confer jurisdiction in this case. Accordingly, we REVERSE the District Court's denial of the tribal defendants' motion to dismiss for lack of subject matter jurisdiction as to all non-habeas claims. We AFFIRM the District Court's dismissal of Mr. Walton's petition for a writ of habeas corpus because banishment from the Tesuque Pueblo Flea Market is not a sufficient restraint on liberty to confer jurisdiction under § 1303. Finally, all outstanding motions are DENIED. The case is DISMISSED for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DON WALTON,

Plaintiff,

vs. **No. CIV 04-00236 RB/WDS**

TESUQUE PUEBLO, *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Oct. 14, 2004)

THIS MATTER comes before the Court on Defendants' ("Tesuque") motion to dismiss pursuant to Federal Rules of Civil Procedure Rule 12(b)(1) for lack of subject matter jurisdiction. (Def.'s Mot. to Dismiss ¶ 1.) The Court exercises jurisdiction under 28 U.S.C. § 1331. Having reviewed the submissions of the parties and the relevant law, I will **DENY** Tesuque's motion to dismiss.

I. Background.

Don Walton, a non-Indian citizen of the United States, received a vendor's permit from Tesuque Pueblo ("Tesuque"), a federally recognized Indian tribe, to sell wooden products at a booth in the Tesuque Pueblo Flea Market ("Market") during the 2003-2004 year. (Compl. ¶ 9.) The Market is a business venture wholly owned by the Tesuque tribe and is located on the thirty square mile Tesuque Reservation just outside of Santa Fe. (Compl. ¶ 3.) The Management, the administrative body that operates the Market and enforces its regulations, charged Mr. Walton with violating

the Market's Rules and Regulations. (Pl.'s Ex. A.) The Market evicted Mr. Walton for "racism to a fellow vendor" on May 18, 2003. (Pl.'s Ex. B.) The Rules and Regulations grant evicted vendors a right to apply in writing within seven days of eviction for a hearing before Management. (Pl.'s Ex. A §IV.) Vendors may then appeal an adverse decision by Management to The Pueblo of Tesuque Tribal Court ("Tribal Court"). *Id.*

Although Mr. Walton never applied for a hearing before Management he filed a complaint in the Tribal Court on August 12, 2003 for 1) declaratory judgment; 2) injunctive relief; 3) defamation; 4) breach of contract, lease or license; 5) deprivation of property without due process; 6) tortious interference with beneficial business relationship; 7) deprivation of liberty without due process/writ of habeas; and 8) prima facie tort. (Defs.' Mem. of Law in Supp. of Pueblo Defs.' Mot. to Dismiss Pl.'s Compl. and Pet. for *Habeas Corpus* Ex. 2.) He then applied for a TRO to enjoin his eviction from the Market on August 15, 2003. *Id.* Tesuque filed a motion to dismiss for Failure to State a Claim and Assertion of the Defense of Tribal Sovereign Immunity on September 2, 2003. (Defs.' Mem. of Law in Supp. of Pueblo Defs.' Mot. to Dismiss Pl.'s Compl. and Pet. for *Habeas Corpus* Ex. 3 at 2.) The Tribal Court conducted a preliminary hearing on the motion to dismiss on September 30, 2003, but ordered the parties to brief the issues presented and present oral arguments on January 7, 2004. *Id.* Meanwhile, the Tribal Council, a legislative body of the tribe, approved "Resolution #10/102-1022," which stated:

> The Pueblo of Tesuque Tribal Council hereby establishes that the Pueblo possesses and enjoys sovereign immunity and has not waived it by

> Resolution, tribal law, or any other lawful authority or document. The tribe asserts that sovereign immunity bars the suit pending in tribal court captioned Walton v. Tesuque Pueblo, Case No. CV-03-137.

(Pl.'s Ex. C.)

Subsequently, on February 13, 2004 the Tribal Court issued an opinion and order in which the Tribal Court granted Tesuque's motion to dismiss for Failure to State a Claim and Assertion of the Defense of Tribal Sovereign Immunity and denied Plaintiff's petition for a TRO without ever reaching the merits of the case. (Defs.' Mem. of Law in Supp. of Pueblo Defs.' Mot. to Dismiss Pl.'s Compl. and Pet. for *Habeas Corpus* Ex. 3 at 3, 13.) Mr. Walton filed an application for an appeal with The Pueblo of Tesuque Court of Appeals on February 23, 2004 and that court denied his appeal without ever conducting a hearing. (Defs.' Mem. of Law in Supp. of Pueblo Defs.' Mot. to Dismiss Pl.'s Compl. and Pet. for *Habeas Corpus* Ex. 4.)

On March 3, 2004, Mr. Walton filed a complaint in this Court for 1) writ of habeas corpus; 2) injunctive relief; 3) deprivation of liberty and property; 4) breach of contract; 5) defamation; 6) tortious interference in beneficial relationship; and 7) prima facie tort. (Compl. ¶ 12.) Tesuque filed a motion to dismiss Mr. Walton's claims for lack of subject matter jurisdiction based on sovereign immunity. (Defs.' Mot. to Dismiss ¶ 1.) Mr. Walton contends that despite Tesuque's assertion of sovereign immunity this Court has subject matter jurisdiction over his claims pursuant to the Indian Civil Rights Act of 1968 ("ICRA") and the Indian Self Determination and Education Assistance Act ("ISDA").

II. Analysis.

A. Standard of review.

In ruling on a motion to dismiss, the court must accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the non-moving party. *See Sutton v. Utah State Sch. for the Deaf and Blind,* 173 F.3d 1226, 1236 (10th Cir. 1999). In accepting the complaint's allegations as true, the court must consider whether the complaint, standing alone, is legally sufficient to state a claim upon which relief may be granted. *See Ordinance 59 Ass'n v. United States Dep't of Interior Sec'y*, 163 F.3d 1150, 1152 (10th Cir. 1998). Where a party challenges the facts upon which subject matter jurisdiction depends pursuant to Rule 12(b)(1): "'[A] district court may not presume the truthfulness of the complaint's factual allegations. [Instead,] [a] court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).'" *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324 (10th Cir. 2002) (*quoting Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)).

Mr. Walton has moved to convert Tesuque's motion to dismiss into a motion for summary judgment. Reliance on evidence outside the pleadings in addressing a motion to dismiss does not, as a general rule, convert the motion to one for summary judgment under FED.R.CIV. P. 56. *Sizova,* 282 F.3d at 1324; *see, e.g. Jones v. Runyon,* 91 F.3d 1398, 1400 (10th Cir. 1996). Moreover, since the Court will deny Tesuque's motion to dismiss, it is not necessary to convert the motion to dismiss into a motion for summary judgment.

B. Jurisdiction.

District courts have subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Subject matter jurisdiction is proper, therefore, if Mr. Walton's claims arise under the ICRA or the ISDA.

C. Sovereign Immunity.

The Supreme Court notes that: "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). An Indian tribe like Tesuque, therefore, is generally only subject to suit where i) Congress has authorized it; ii) the tribe has unequivocally waived its immunity; or iii) if the cause of action falls under the habeas provision. § 1303, of the ICRA. *See Santa Clara Pueblo,* 436 U.S. at 58; *Ordinance 59 Ass'n v. United States Dep't of Interior Sec'y,* 163 F.3d 1150, 1154 (10th Cir. 1998). The Tenth Circuit, however, recognizes a fourth method by which an Indian tribe may be sued under § 1302 of the ICRA that is often referred to as the *Dry Creek* exception to sovereign immunity. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes,* 623 F.3d 682 (10th Cir. 1980). Each of these four methods will be considered in turn.

1. Congressional authorization.

In that Congress has not authorized a suit against Tesuque in this case, the analysis must proceed to the remaining methods whereby Tesuque can be sued.

2. Waiver under § 450 of the ISDA.

Although Tesuque has expressed an intent *not* to waive its sovereign immunity (Pl.'s Ex. C), Mr. Walton claims that Tesuque waived its sovereign immunity pursuant to § 450 of the ISDA. (Resp. in Opp'n to Mot. to Dismiss at 5-6.) The ISDA is intended to promote tribal autonomy and self-determination by allowing tribes to operate programs previously operated by the federal government. *Cherokee Nation of Okla. v. Thompson,* 311 F.3d 1054, 1055 (10th Cir. 2002). Under the ISDA, 25 U.S.C. §§ 450-450(n), as amended, both the Secretary of Health and Human Services and the Secretary of the Interior may enter into contracts with Indian tribes ("self-determination contracts") that permit the tribes to administer various programs that the appropriate Secretary would otherwise oversee. *Id.*

Mr. Walton's argument relies on Section 450f(c)(3)(A), which provides in relevant part:

> Any policy of insurance obtained or provided by the Secretary . . . shall contain a provision that the insurance carrier shall waive any right it may have to *raise as a defense the sovereign immunity of an Indian tribe from suit.* . . . [S]uch wavier shall extend only to claims . . . within the coverage . . . of the policy and *shall not . . . otherwise limit the tribe's sovereign immunity* . . . . 25 U.S.C. § 450f(c)(3)(A) (emphasis added).

Mr. Walton contends that since the Government provides Tesuque with liability insurance, Tesuque can not raise a sovereign immunity defense in this suit. The ISDA, however, only authorizes federal court jurisdiction "for disputes *between [a] tribe and [the] federal government*

under self-determination contracts." Demontiney v. United States, et al., 255 F.3d 801, 813 (9th Cir. 2001) (emphasis added). The ISDA only applies to self-determination contracts between Indian tribes and the United States and does not apply to other contracts or licenses between an American citizen and an Indian tribe. 25 U.S.C. § 450(c)(1). Mr. Walton's contract/license with Tesuque is not a self-determination contract under the ISDA. The ISDA, therefore, does not apply to this dispute. Because the ISDA is inapplicable and Tesuque never unequivocally waived, it can still assert its sovereign immunity defense.

3. § 1303 of the ICRA.

The third method the Court can utilize to assert jurisdiction in this case is under § 1303 of the ICRA, which provides that: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. Mr. Walton relies on *Poodry v. Tonawanda Band of Seneca Indians,* 85 F.3d 874 (2d Cir. 1996). In *Poodry,* the Second Circuit held that written tribal orders permanently banishing Plaintiffs from the reservation amounted to a detention sufficient to permit invocation of habeas corpus jurisdiction under the ICRA. *Id.* at 901. The Second Circuit stated that "petitioners must satisfy the jurisdictional prerequisite for habeas review by demonstrating a sufficiently severe potential or actual restraint on liberty." *Id.* Mr. Walton contends that in addition to his eviction from the Market, when he went to the Reservation in July 2003, Tesuque security forcibly removed him and advised that Defendant Silva (one of the individual Defendants) had "permanently banished him from the entire Reservation." (Compl. ¶ 17.)

In response Tesuque offers a letter written by the Governor of the tribe to Mr. Walton's attorney that states: "At no time was Mr. Walton ever banished from the Pueblo of Tesuque by the Tribal Council [the only governmental body vested with the authority to banish] in the form of a letter or Court Order. Mr. Walton may enter the Pueblo . . . and he may patron [sic] the Camel Rock Casino, and he is free to traverse the Pueblo on public roadways and highways." (Defs.' Mem. of Law in Supp. of Pueblo Refs.' Mot. to Dismiss Pl.'s Compl. and Pet. for *Habeas Corpus* Ex. 1.) In addition, Mr. Walton's eviction notice never indicated that he was banished from the Pueblo. (Pl.'s Ex. B.) In *Poodry,* on the other hand, the tribal court issued an order explicitly prohibiting Plaintiffs from entering the reservation. Tesuque provided Mr. Walton with written permission to enter the Pueblo and use its facilities. The revocation of Mr. Walton's vendor's permit and his eviction from the flea market do not constitute banishment under *Poodry* or "detention" under the ICRA. Mr. Walton, therefore, does not allege the significant restraint on liberty necessary for habeas review.

4. The Dry Creek exception.

The Tenth Circuit outlined a narrow exception to sovereign immunity in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.3d 682 (10th Cir. 1980) that allows a Plaintiff to file a private cause of action under § 1302 of the Indian Civil Rights Act. Section 1302(8) of the ICRA provides that: "No Indian tribe can deny any person within it's jurisdiction life, liberty or *property* without Due Process." 25 U.S.C.A. § 1302(8). Mr. Walton claims that Tesuque deprived him of a property right (in the vendor's permit issued to him) without due process. To

overcome a tribe's assertion of sovereign immunity and enforce their § 1302 rights a Plaintiff must show that i) the dispute involves a non-Indian party; ii) a tribal forum is not available; and iii) the dispute does not involve an internal tribal matter. *Ordinance 59 Ass'n v. U.S. Dep't of the Interior Sec'y,* 163 F.3d 1150, 1156 (10th Cir. 1998).

The inquiry then becomes whether Mr. Walton, a non-Indian party, was afforded a tribal forum in which to adjudicate his claims. *Ordinance 59 Ass'n,* 163 F.3d at 1154. Courts recognize both tribal courts and nonjudicial bodies as appropriate forums to adjudicate the rights created under § 1302 of the ICRA. *Santa Clara Pueblo,* 436 U.S. at 65-66. Mr. Walton could have applied for a hearing before Management of the Market, which is essentially an administrative body, to contest his eviction.

Mr. Walton did file an action in the Tribal Court and an application for appeal in The Pueblo of Tesuque Court of Appeals. The Tribal Council, however, passed a unanimous Resolution dismissing Mr. Walton's case before the Tribal Court ever adjudicated his claims. Afterwards, the Tribal Court dismissed Mr. Walton's case without reaching the merits. The Tribal Court based its ruling on sovereign immunity, which the Resolution stated applied in Mr. Walton's case. The Court of Appeals then denied his appeal.

In applying this narrow exception to sovereign immunity the court in *Dry Creek* found that "[t]here is no [meaningful] forum where [a] dispute can be resolved and the personal and property rights asserted by plaintiffs be considered." *Dry Creek* at 684. The court stated that: "To hold that they have access to no court is to hold that they have constitutional rights but have no remedy." *Id.* at 685.

For purposes of Tesuque's motion to dismiss, this Court accepts the facts alleged by Mr. Walton as true and finds that the Resolution and the actions of the tribal courts effectively precluded Mr. Walton from obtaining any relief Tesuque gave Mr. Walton the right to due process without any available remedy. Mr. Walton, therefore, has satisfied the second prong of the *Dry Creek* exception.

The third prong of the *Dry Creek* exception requires the Court to determine whether this dispute involves an internal tribal matter. Whether the nature of the dispute is internal has been apparent in most cases. *See, e.g., Santa Clara Pueblo,* 436 U.S. at 49 (stating that an action by a member of the Tribe challenging tribal officials on the criteria used to determine tribal membership was inherently internal); *Nero v. Cherokee Nation of Okla.*, 892 F. 2d 1457 (10th Cir. 1989) (finding that suit brought by descendants of slaves owned by Cherokee Indian Nation alleging violation of constitutional and statutory provisions from denial of their right to vote in tribal elections to be an internal matter).

Dry Creek, on the other hand, involved an action brought by a non-Indian owned hunting lodge corporation located on land bordering an Indian reservation. *Dry Creek Lodge, Inc.*, 623 F.2d at 684. The lodge owners filed suit against the Indian tribes who blocked the only road from the lodge to the main highway. *Id.* The actions of the tribes prevented Plaintiffs from conducting business, thereby depriving Plaintiffs of their property without due process. *Id.* at 685. The *Dry Creek* court stated that "[t]he reason for the limitations and the references to tribal immunity . . . disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian." *Id.* The Tenth Circuit held that this violation

of the constitutional rights of American citizens did not involve an internal matter. *Id.* at 685.

Mr. Walton's case, similarly, involves an alleged violation of the property rights of a non-Indian without due process. In addition, the Market was open to the public. Non-Indians, like Mr. Walton, were free to obtain vendor's permits to do business in the Market. Management of a flea market that is open to the public does not implicate the essential exercise of sovereignty that the sovereign immunity defense is designed to protect. Although the sovereignty of Indian tribes is well recognized, "the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Dry Creek,* 623 F.2d at 685 (internal quotations omitted). For the purpose of Tesuque's motion to dismiss, this Court finds that this dispute does not involve an internal tribal matter. This Court, therefore, finds that Mr. Walton has alleged sufficient facts for the *Dry Creek* exception to apply in this case.

Accepting Mr. Walton's allegations as true for the purposes of Tesuque's Rule 12(b)(1) motion to dismiss, the Court finds that the *Dry Creek* exception to sovereign immunity could apply in this case. The Court, therefore, has subject matter jurisdiction over this dispute. **IT IS ORDERED** that Defendants' motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is hereby **DENIED**.

/s/ Robert C. Brack
ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE

[LOGO] ***Pueblo of Tesuque***
Route 42 Box 360-T
Santa Fe, New Mexico 87506

IN THE PUEBLO OF TESUQUE COURT OF APPEALS

COUNTY OF SANTA FE STATE OF NEW MEXICO

DON WALTON,
Plaintiff,

Vs.

TESUQUE PUEBLO, TESUQUE PUEBLO FLEA MARKET, DUANE SILVA, AND ISMAIL ABAYHAN
Defendants.

ORDER DENYING PLAINTIFF'S APPEAL

WHEREAS, Plaintiff did apply to this Court on February 23, 2004, for review of the *Memorandum Opinion and Order Granting Motion to Dismiss,* issued by the Pueblo of Tesuque Tribal Court on February 13, 2004, in case numbered CV-03-127 captioned *Don Walton v. Tesuque Pueblo, Tesuque Pueblo Flea Market, Duane Silva, and Ismail Abayhan*;

WHEREAS, this court has jurisdiction over the parties and subject matter herein pursuant to the Pueblo of Tesuque Law and Order Code §1-3-3; and

WHEREAS, a copy of the Plaintiff's *Notice of Appeal* and *Docketing Statement on Appeal* has been served on respondent in the above-entitled case.

NOW, THEREFORE, the application for review is hereby denied with this Court finding no reviewable issues present as stated in the *Docketing Statement On Appeal.*

This Court hereby affirms the Pueblo of Tesuque Tribal Court's *Memorandum Opinion and Order Granting Motion to Dismiss* and the Pueblo of Tesuque Tribal Court is hereby ordered to proceed with any and all judicial procedures consistent with this order.

IT IS SO AFFIRMED AND ORDERED.

/s/ Ramos Romero — Feb. 25, 04
Ramos Romero-Chief Judge — Date
Pueblo of Tesuque Court of Appeals

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[LOGO]

PUEBLO OF TESUQUE *TRIBAL COURT*
ROUTE 42, BOX 360-T *Phone: (505) 989-4969*
SANTA FE, NEW MEXICO 87506 *Fax: (505) 989-5037*

IN THE PUEBLO OF TESUQUE TRIBAL COURT

County of Santa Fe State of New Mexico

DON WALTON, **CASE # CV-03-137**
Plaintiff,

v.

TESUQUE PUEBLO, TESUQUE PUEBLO FLEA MARKET DUANE SILVA. AND ISMAIL ABAYHAN,
Respondents.

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO DISMISS

(Filed February 13, 2004)

THIS MATTER comes before the Pueblo of Tesuque Tribal Court as a "Case of First Impression." The issues presented before the Court are: (1) Does the Pueblo of Tesuque enjoy Sovereign Immunity? If so, has the Pueblo of Tesuque waived its Immunity? (2) Do employees (agents) of the Pueblo of Tesuque enjoy Immunity?

PROCEDURAL HISTORY

On August 12, 2003, Don Walton (herein after Plaintiff) filed a Civil Complaint against Defendants Tesuque Pueblo, Tesuque Pueblo Flea Market, Duane Silva and Ismail Abayhan, citing eight causes of action for (1) Declaratory Judgment, (2) Injunctive Relief, (3) Defamation, (4) Breach of

Contract, Lease or License, (5) Tortious Interference with Beneficial Business Relationship, (6) Deprivation of Civil and Constitutional Rights, (7) Prima Facie Tort, and (8) Outrageous Conduct and Civil Conspiracy. Plaintiff further filed an Application for Temporary Restraining Order on August 15, 2003, enjoining his eviction from the Tesuque Pueblo Flea Market and territory of Tesuque Pueblo.

Defendants Tesuque Pueblo, Tesuque Pueblo Flea Market and Duane Silva (herein after Pueblo) filed an Answer to Complaint and Motion to Dismiss for Failure to State a Claim and Assertion of the Defense of Tribal Sovereign Immunity on September 2, 2003. Defendant Ismail Abayhan filed a Motion to Dismiss for Failure to State a Claim on September 8, 2003. In addition, Plaintiff filed a Request for Witness and Evidence on September 8, 2003. In response to Plaintiff request for witness and evidence, the Pueblo and Defendant Abayhan filed a Joint Motion to Continue Evidentiary Hearing. On September 15, 2003, the Court granted Defendants Motion to Continue and issued an Order to Continue Evidentiary Hearing, also setting a preliminary hearing limited to the motions to dismiss for September 30, 2003.

Plaintiff then filed a Response to Motion to Dismiss of Defendants Tesuque Pueblo, Tesuque Pueblo Flea Market and, Silva on September 17, 2003 and a Response in Opposition to Motion to Dismiss Defendant Abayhan on-September 19, 2003. The Pueblo then filed a Reply to Plaintiff Don Walton's Response to Motion to Dismiss of Defendant Tesuque Pueblo on September 23, 2003. Plaintiff then submitted a Trial Brief on September 25, 2003.

The Court conducted the preliminary hearing on the motions to dismiss on September 30, 2003. Upon hearing

the Court determined several issues needed to be addressed which posed a paramount interest and ordered the Plaintiff and Defendant Pueblo to brief the issues presented and set oral argument to take place on January 7, 2004.

PRELIMINARY HEARING ON MOTIONS TO DISMISS

The Court conducted the preliminary hearing on the motions to dismiss on September 30, 2003, appearing before the Court were Plaintiff, Don Walton with his counsel Eric Treisman, Esq., Defendant Tesuque Pueblo through counsel on record Sharon Pomeranz, Esq., Defendant Duane Silva, Defendant Ismail Abayhan with his counsel Naomi Barnes, Esq., and Corey Abayhan, son of Defendant Ismail Abayhan.

A. Defendant, Pueblos Motion to Dismiss.

The Court found:

1. The Court has personal jurisdiction over the above named parties pursuant to the Pueblo of Tesuque First Amended and Restated Law and Order Code, (amended & restated on March 20, 2000, Resolution # 2000-02-04) TITLE I JURISDICTION, ARTICLE 2 JURISDICTION, Section 1-2-1 Civil Jurisdiction, which reads in part "[T]he Pueblo Courts may exercise civil jurisdiction on any basis consistent with the inherent sovereignty and immunity of the Pueblo Tribal Law, and/or applicable federal law. More specifically, the *Tribal Court may exercise civil jurisdiction over all persons in all actions or matters arising on, or causing a foreseeable effect on, the Reservation and over all actions and matters arising under Tribal law.*" (Emphasis added)

2. The Court has subject matter jurisdiction over the issues before the Court pursuant to the Pueblo of Tesuque First Amended and Restated Law and Order Code, TITLE I JURISDICTION, ARTICLE 3 ESTABLISHMENT OF THE PUEBLO COURTS, Section 1-3-2 Tribal Court, "There is hereby established the Pueblo of Tesuque Tribal Court, which, except as otherwise provided in the Title or in the Law and Order Code, *shall have general civil and criminal jurisdiction over all matters arising under Tribal Law and shall have exclusive jurisdiction to hear appeals from final administrative judgments and decisions of departments, commissions, agencies, and other administrative bodies of the Pueblo as authorized by the Law and Order Code. . . . The jurisdiction of the Tribal Court over any person, cause of action, or subject matter may be concurrent with and shall not be barred or otherwise limited by any valid jurisdiction over the same person, cause of action, or subject matter by any court of competent jurisdiction . . .* " (Emphasis added)

3. The matter before the Court is a "Case of First Impression", wherein the Pueblo of Tesuque is being sued in the Pueblo of Tesuque Tribal Court.

4. The Pueblo of Tesuque has operated on a *theocratic* government since *time immemorial.*

5. The Pueblo of Tesuque is a non-constitutional Nation and continues the *immemorial usage* of its customs and traditions, and the Pueblo of Tesuque Tribal Council is vested with full governmental authority which includes but is not limited to carrying out the operation of its executive, legislative and judicial functions.

6. The Pueblo of Tesuque has adopted a "Resolution" system for conducting all governmental affairs and such system has not been deemed public information.

7. This Court must make a determination on the application of the Pueblo of Tesuque First Amended and Restated Law and Order Code, TITLE I JURISDICTION, ARTICLE 1 GENERAL PROVISIONS Section 1-1-4 Sovereign Immunity *"Except as expressly and specifically waived by a resolution of the Tribal Council or by express and specific provision in Tribal Law, the Pueblo of Tesuque is immune from suit, and its officers and employees are immune from suit for liability arising from the performance of their official duties."* (Emphasis added) to the matter in dispute.

8. The substantial interests at issue before this Court, is to determine:

   A. *"Whether the Pueblo of Tesuque enjoys Sovereign Immunity"*;

   B. *"Whether the Pueblo of Tesuque has waived such Immunity"; and*

   C. *"Whether employees of the Pueblo of Tesuque enjoy Immunity."*

Based on the findings of the Court and the substantial interest at stake, the Court moved both parties to brief the issues stated above, and upon receipt of the briefs, the Court would set a hearing for oral argument on the issues.

B. Defendant, Abayhan's Motion to Dismiss.

The Court found both personal and subject matter jurisdiction over this cause pursuant to Section 1-2-1 Civil

Jurisdiction, (Id. p. 2-3) and Section 1-3-2 Tribal Court, (Id. p. 3).

Defendant Abayhan argued in his Motion to Dismiss, Plaintiff failed to state a claim for cause of action under Tesuque Pueblo Tribal Law, that no tribal law exists recognizing Plaintiffs claims and no remedy exists upon which relief can be granted. However, the Court found Title I Jurisdiction, Article 4 Statue of Limitations, Section 1-4-1 Limitations of Civil Actions, is applicable and denied Defendant Abayhans Motion to Dismiss. The Court further granted leave to Plaintiff to amend his complaint and allowed Defendant Abayhan to file an answer to Plaintiffs amended complaint.

The Court has also determined that this is a "Case of First Impression" and that due diligence is warranted in the handling of this matter. Therefore, the Court ordered this matter between Plaintiff and Defendant Abayhan to run on separate proceedings from that of the matter between Plaintiff and Defendant Pueblo.

ORAL ARGUMENT

Plaintiff submitted his Supplemental Brief on Immunity Defense of Tribe and Agents on October 3, 2004, and Defendant Pueblo submitted a Supplemental Brief on the Sovereign Immunity of the Pueblo of Tesuque and a Supplemental Brief on the Immunity of Tribal Agents. The Court was to set oral argument within 30 days of submission of the briefs, however, due to Plaintiffs counsel being unavailable November 3 through November 19, the Pueblo of Tesuque feast activities in November and December holidays, the Court set oral argument for January 7, 2004.

Appearing before the Court for oral argument were Plaintiff, Don Walton with his counsel Eric Treisman, Esq., Defendant Tesuque Pueblo through counsel on record Sharon Pomeranz, Esq.

TESUQUE TRIBAL COURT JURISDICTION

The Pueblo of Tesuque has since time immemorial exercised its powers of self-government by and through its theocratic form of government. Having stood at its present location since 1200AD, the Pueblo of Tesuque has been recognized by the countries of Spain and Mexico, the State of New Mexico and the United States. The recognition as a government is symbolized in the canes presented to the Pueblo of Tesuque by the King of Spain, the President of Mexico, the President of the United States Abraham Lincoln, and the then Governor of New Mexico Bruce King, which the Pueblo of Tesuque possess to the present day.

The Pueblo of Tesuque overcoming many attempts of cultural assimilation has maintained its traditional form of government, electing not to reorganize under the Indian Reorganization (Wheeler-Howard) Act of 1934 and institute a constitutional form of government. In maintaining its federal recognition, the Pueblo of Tesuque instead. incorporated and instituted a resolution system to uphold its traditional based inherent authorities of self-government. The U.S. Supreme Court held in *U.S. v. Sandoval*, 231 U.S. 28, that the Pueblos of New Mexico, like reservation Indians, should also be afforded the fostering care and protection of the U.S. Government, thus recognizing the Pueblos sovereign status although limited. *See Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, (1823);

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, (1832).

In exercising its powers of self-government the Pueblo of Tesuque passed Resolution No. 1985-12-01 (Dec. 19, 1985), approving the Pueblo of Tesuque Tribal Law and Order Code and establishing the Tribal Court, stating in part, "[T]he Tribal Council upon due consideration and based on its sovereign authorities, approves the code and hereby authorizes and empowers the Tesuque Tribal Court, Governor ex-Governors, or any person duly appointed, to administer justice for the Tesuque Pueblo Courts . . . " This action reinforced the inherent authority of the Pueblo of Tesuque and formalized the court system to address criminal and civil matters within the jurisdiction of the Pueblo of Tesuque. This is further affirmed in the passage of Resolution No. 1993-01-07 (Jan. 7, 1993), Affirming the Pueblo of Tesuque Tribal Law and Order Code and Resolution No. 2000-02-04 (Mar. 20, 2000), Pueblo of Tesuque First Amended and Restated Law and Order Code.

As the Court ruled in the Preliminary Hearing on Motions to Dismiss, this Court has general civil jurisdiction over all matters arising under Tribal Law. (Section 1-2-1 Civil Jurisdiction and Section 1-3-1 Tribal Court, Id. p. 2-3) In affirming tribal inherent powers to exercise certain forms of civil jurisdiction within their territory, more specifically over non-Indians as presented before the court, the U.S. Supreme Court stated a "tribe may regulate activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Montana v. U.S.*, 450 U.S. 544, 565 (1981). *See also Tatlon v. Mayes*, 163 U.S. 376 (1896).

Therefore, the Pueblo inn maintaining its powers of self-government also retain its inherent powers of sovereignty, which have not been taken away by Congress, the U.S. Constitution, or given up by the Pueblo of Tesuque. Congress has plenary authority over tribes and Pueblos to limit, modify or eliminate the powers of local self-government which the tribe otherwise possess, *U.S. v. Kagama*, 118 U.S. 375 (1886); 187 U.S. 294, 305-307 (1902). Stating it may waive a tribe's sovereign immunity pursuant to its plenary power.

SOVEREIGN IMMUNITY

Sovereign Immunity poses issues involving jurisdiction and a tribal defense of sovereign immunity will always automatically raise the question of a tribal court's jurisdiction over the tribal entity, its agents, representatives and employees. As in this instance, the matter before the Court is a "Case of First Impression."

Defendant Pueblo is correct in arguing that tribes and Pueblos are not subject to the Bill of Rights and other U.S. Constitutional guarantees as afforded in protection against action by federal, state and local governments. "[A]s separate sovereigns pre-existing the Constitution, Tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The U.S. Supreme Court in, *United States v. Wheeler*, 435 U.S. 313 (1978), further stated Tribal governments are "unique aggregations possessing attributes of sovereignty over both their members and their territory."

1. Does the Pueblo of Tesuque enjoy Sovereign Immunity?

The answer is yes. Historically and as a general rule, tribes and Pueblos are immune from suit unless Congress has explicitly waived suit or the tribe or Pueblo have themselves waived suit. "[I]ndian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) *See also United States v. Testan*, 424 U.S. 392 (1976); *United States v. United States Fedelity & Guarantee Corporation*, 309 U.S. 506 (1940); *Kiowa Tribe of Oklahoma v. Manufacturing Technology Inc.*, 523 U.S. 751 (1998).

WAIVER OF SOVEREIGN IMMUNITY

Plaintiff argues pursuant to the Indian Civil Rights Act of 1968, 25 U.S.C. 1302, that there is a waiver of tribal sovereign immunity. Plaintiff's argument and analysis of the Indian Civil Rights Act (1968), 25 U.S.C. § 1302(8) is flawed. Congress did have the intention to extend and create constitutional like rights within Indian Country, however limited Federal review to Habeas Corpus. "[G]iven Congress' desire not to intrude needlessly on tribal self-government, it is not surprising that Congress chose . . . to provide for federal review only in habeas corpus proceedings." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The Supreme Court went on to say "unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty . . . , we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers."

That is not to say that tribes or Pueblos are fully immune from suit, as the Jicarilla Tribal Court found, "Title 25, United States Code, Section 450(c)(3) provides that an insurance company may not assert a defense of sovereign immunity if the agency or program is funded through a 638 contract and sued in Federal District Court." *Gomez v. Fisher*, Case No. 96-11126 (1997) The Jicarilla Tribal Court used the analysis found under *Evans v. McKay*, 869 F. 2d. 1341 (1989) that a third party who was injured by a BIA agent could bring an action against the U.S. government under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

The Pueblo of Tesuque has waived its immunity from suit under federally funded 638 contract programs. In addition, the Pueblo of Tesuque has also waived its immunity from suit pursuant to Tribal Resolution # 1997-07-04 Re: Authorization and Enacting a Tribal-State Class III Gaming Compact with the State of New Mexico, which was approved, on August 29, 1997. The waiver is found under Section 8 Protection of Visitors (d) Specific Waiver of Immunity p. 48, which reads m pertinent part:

"[T]he Tribe, by entering into this Compact and agreeing to the provisions of this section, waives its defense of sovereign immunity in connection with claims for compensatory damages . . . This is a limited waiver and does not waive the tribe's immunity from suit for any other purpose."

The Congressional authorization for this limited waiver is found in the Indian Gaming Regulatory Act, 29 U.S.C. 2710, Section d(3)(c)(1) and (7). *See also Jones v. Chitimacha Tribe of Louisiana*, Case No. CV-94-0035 (1996) (which such limited waiver applied not only to

patrons, but employees, contractors, visitors, guests, agents, or other members of the public, arising from claims under Class III gaming activities.)

1. (A) Has the Pueblo of Tesuque waived its Immunity?

The answer is No, in this instance. Pursuant to Title I Jurisdiction, Article I General Provisions, Section 1-1-4 Sovereign Immunity the Pueblo of Tesuque, which reads:

"[E]xpect as expressly and specifically waived by a resolution of the Tribal Council or by express and specific provision in Tribal Law, the Pueblo of Tesuque is Immune from suit, and its officers and employees are immune from suit for liability arising from the performance of their official duties."

Thus the Pueblo of Tesuque has not waived its immunity from suit through Tribal Resolution # 1999-03-03 Tesuque Pueblo Flea Market Rules and Regulations (March 15, 1999), revised January 2002 and revised January 2003. Nowhere in this resolution did the Pueblo of Tesuque waive its immunity, but exercised its inherent authority of self-government and that it further "reserves the right to amend, add, delete and terminate all Tesuque Pueblo Flea Market Vendor Permits at any and all tunes, pursuant to the authority of the Pueblo of Tesuque Tribal Council." Ibid.

Under the Tesuque Pueblo Flea Market Rules and Regulations it states under *Permits*: (page 3) "The granting of a Permit to a Vendor by the Management does not constitute a contract between the Pueblo/Management and a vendor. It merely indicates a license to use of Pueblo Lands temporarily for a limited purpose." Nor is there an

implied right to an administrative process, as the rules and regulations were amended in January 2003 and did not include an administrative due process clause.

Plaintiff argues that, as a result of his vendor permit revocation, his lively-hood has been substantially impaired. This simply is not true. As with many businesses, individuals assume some risk in the type of operations they choose. The Pueblo of Tesuque has elected to own and operate a flea market for the purpose of sustaining its government and provides a vehicle to both Indians and non-Indians to promote their business at the flea market. (This is stated in the "Release and Indemnification Agreement" entered into and signed by Plaintiff on January 22, 02) The Tesuque Pueblo Flea Market is not the only venue available for Plaintiff to conduct his business; there are other flea markets within the State of New Mexico as well as the opportunity for Plaintiff to establish his own "shop" within the State. Plaintiff is not limited to taking advantage of a forum provided by the Pueblo of Tesuque, what if the Pueblo of Tesuque Flea Market were to close? That would be a loss to the Pueblo its programs and ultimately its members, and vendors. Revisions to the Pueblo of Tesuque Flea Market Rules and Regulations do not provide a waiver of tribal immunity nor does it imply and contract rights for vendors.

Plaintiff has failed to show that Defendant Pueblo has specifically and unequivocally waived its immunity from suit in this instance.

AGENT IMMUNITY

As stated above, the Indian Civil Rights Act of 1968 does not imply a waiver of tribal immunity, not only

against the tribe but also its agents. Plaintiff argues that § 1302(8) is an express waiver of a tribes immunity, however, the Supreme Court in *Hardin v. White Mountain Apache Tribe*, 779 F.2d. 476, 479 (9th Cir. 1985) stated that tribal officers are immune from suit while, "acting in their representative capacity and within the scope of their authority." *See also Imperial Granite v. Pala Tribe of Mission Indians*, 940 F. 2d 1269, 1271 (9th Cir. 1991)

2. Do employees (agents) of the Pueblo of Tesuque enjoy Immunity?

The answer is Yes. Defendant Silva was acting within his scope of delegated authority and suits brought against agents in their official capacities enjoy the same immunity as if it were brought against the tribe. "[I]t is clear that unless an explicit congressional waiver has been created or the Tribe has explicitly consented to be sued sovereign immunity presents an impenetrable barrier to those seeking redress against the Tribe. And because the Tribe cannot act without officials or employees acting for it, they are also cloaked with immunity when acting in their official capacity and within the scope of their authority." *Bellue v. Puyallup Tribe of Indians*, Civ. No. 94-3045 (1994) (Citing *U.S. v. Oregon*, 657 F. 2d. 1009, 1012 (9th Cir. 1981) *See also Nero et al v. Cherokee nation of Oklahoma*, 892 F. 2d. 1457, 1462 (10th Cir. 1989) and *Wheeler v. Swimmer*, 835 F. 2d. 259, 262 (10th Cir. 1987)

The waiver of immunity must be clear, unambiguous, explicit and unequivocal if there is to be suit filed against the tribe or its agents. Unlike the Navajo Nation in passing Title 7, Section 854(c) which allows a waiver for the Navajo Nation to be sued in the courts of the Navajo Nation, with respect to any claim for which the Navajo

Nation carries liability insurance, the Pueblo of Tesuque does not have such a waiver, nor has it incorporated a Tort Claim Act, aside from the exceptions listed in Title I Jurisdiction, Article 4 Statute of Limitations, Section 1-4-1 Limitations of Civil Actions (2000 supra.)

APPLICABLE LAWS

Plaintiff further contends Title I Jurisdiction, Article 1 General Jurisdiction, Section 1-1-5 Basis for Judicial Determination of Law; Choice of Law provides for a waiver of tribal immunity by citing subsection (A) which reads: "[T]he Pueblo Courts shall apply any applicable laws of the United States and all Tribal Law that is not prohibited by applicable federal law." Plaintiff fails to cite the remaining section under (A)(2) which states, "[T]he Pueblo Courts shall apply Tribal Law in a way that gives effect to the intent and purposes of the Tribal Council . . . " and under (B) "[T]he Pueblo Courts shall not be bound by the law of any other jurisdiction unless so required by applicable federal law, Tribal Law, or Court of Appeals precedent." Plaintiff has failed to show that any federal or tribal law has waived Defendant Pueblos' immunity for both the tribe and its agents.

As stated earlier, the Indian Civil Rights Act of 1968 is not an implied waiver of tribal immunity for the tribe and its agents, therefore it is inapplicable here. Plaintiffs argument citing *Poodry v. Tonowanda Band of Seneca Indians*, 85 F. 3d. 874 (2nd Cir. 1996) is out of context in this instance, in that the banishment there involved tribal members who sought a habeas corpus claim under the Indian Civil Rights Act. The Court in Poodry did find an implication for review under habeas corpus, stating

Plaintiff "must demonstrate, under Jones v. Cunningham (citations omitted), and its progeny, a severe actual or potential restraint on liberty." However in this instance Plaintiff has made no viable claim that a "severe actual or potential restraint of liberty" exists. Plaintiff has no protected right under the Indian Civil Rights Act to initiate a habeas corpus claim as the Vendor Permit is "revocable" at the will of the Pueblo of Tesuque and it is understood (in the signing of the Vendor Permit, the Release and Indemnification Agreement, in reading the Tribal Resolution and Flea Market Rules and Regulations) that no property or interest right convey to Plaintiff.

The *"Dry Creek"* exception does not apply either, as Plaintiff has personally appeared before this court, has not objected to the Tribal Court jurisdiction and has had an opportunity to be heard. *See Ordinance 59 Association v. United States Department of the Interior*, 163 F. 3d. 1150, 1158-59 (10th Cir. 1998) and *White v. Pueblo of San Juan*, 728 F. 2d. 1307, 1312 (10th Cir. 1984) (limit the exceptions of the Dry Creek cases) Lastly, in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) the Supreme Court stated, "[T]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."

ORDER

Based on the foregoing, the Defendant Pueblo's Motion to Dismiss is hereby granted. Plaintiff's complaint against Tesuque Pueblo, Tesuque Pueblo Flea Market and Duane Silva are dismissed with prejudice, and Plaintiffs Petition for Temporary Restraining Order is denied.

Done the 13th day of February 2004.

/s/ Roman J. Duran
ROMAN J. DURAN, CHIEF JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DON WALTON,

Plaintiff-Appellee-
Cross-Appellant,

v.

TESUQUE PUEBLO; TESUQUE PUEBLO FLEA MARKET; MARVIN HERRERA, individually and in his official capacity as Governor of Tesuque Pueblo; CLARENCE CORIZ; NORBERT LENO; MICHAEL ALBERT VIGIL; HAROLD SAMUEL; GARY MOQUINO; ALLEN DURAN; ROBERT DORAME, JR.; CLIFFORD MOQUINO, individually and in their official capacities as Tribal Councilors of Tesuque Pueblo; DUANE SILVA, individually and as an officer of Tesuque Pueblo; TESUQUE TRIBAL COURT; TESUQUE TRIBAL CONTRACTORS, 1-10,

Defendants-Appellants-
Cross-Appellees.

Nos. 04-2305
04-2310

JICARILLA APACHE NATION; THE NAVAJO NATION; THE UTE MOUNTAIN UTE TRIBE; THE PUEBLO OF ACOMA; THE PUEBLO OF COCHITI; THE PUEBLO OF ISLETA; THE PUEBLO OF JEMEZ; THE PUEBLO OF LAGUNA; THE PUEBLO OF NAMBE; THE PUEBLO

OF SANDIA; THE PUEBLO OF SAN JUAN; THE PUEBLO OF SANTA ANA; THE PUEBLO OF SANTA CLARA; THE PUEBLO OF SANTO DOMINGO; THE PUEBLO OF ZIA,

Amici Curiae.

ORDER

Filed June 12, 2006

Before **TACHA** Chief Circuit Judge, **EBEL**, Circuit Judge, and **CASSELL***, District Judge.

Appellee/Cross-Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ Audrey F. Weigel
Deputy Clerk

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* Honorable Paul G. Cassell, District Judge, United States District Court for the District of Utah, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DON WALTON,

Plaintiff-Appellee-
Cross-Appellant,

v.

TESUQUE PUEBLO; TESUQUE PUEBLO FLEA MARKET; MARVIN HERRERA, individually and in his official capacity as Governor of Tesuque Pueblo; CLARENCE CORIZ; NORBERT LENO; MICHAEL ALBERT VIGIL; HAROLD SAMUEL; GARY MOQUINO; ALLEN DURAN; ROBERT DORAME, JR.; CLIFFORD MOQUINO, individually and in their official capacities as Tribal Councilors of Tesuque Pueblo; DUANE SILVA, individually and as an officer of Tesuque Pueblo; TESUQUE TRIBAL COURT; TESUQUE TRIBAL CONTRACTORS, 1-10,

Defendants-Appellants-
Cross-Appellees.

Nos. 04-2305
04-2310

JICARILLA APACHE NATION; THE NAVAJO NATION; THE UTE MOUNTAIN UTE TRIBE; THE PUEBLO OF ACOMA; THE PUEBLO OF COCHITI; THE PUEBLO OF ISLETA; THE PUEBLO OF JEMEZ; THE PUEBLO OF LAGUNA; THE PUEBLO OF NAMBE; THE PUEBLO

OF SANDIA; THE PUEBLO OF SAN JUAN; THE PUEBLO OF SANTA ANA; THE PUEBLO OF SANTA CLARA; THE PUEBLO OF SANTO DOMINGO; THE PUEBLO OF ZIA,

Amici Curiae.

ORDER

Filed June 12, 2006

Before **TACHA** Chief Circuit Judge, **EBEL**, Circuit Judge, and **CASSELL***, District Judge.

The order which entered earlier this day denying the pending petition for rehearing is withdrawn. That order entered via a clerical error. The petition remains pending.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ Audrey F. Weigel
Deputy Clerk

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* Honorable Paul G. Cassell, District Judge, United States District Court for the District of Utah, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DON WALTON,

Plaintiff-Appellee-
Cross-Appellant,

v.

TESUQUE PUEBLO; TESUQUE PUEBLO FLEA MARKET; MARVIN HERRERA, individually and in his official capacity as Governor of Tesuque Pueblo; CLARENCE CORIZ; NORBERT LENO; MICHAEL ALBERT VIGIL; HAROLD SAMUEL; GARY MOQUINO; ALLEN DURAN; ROBERT DORAME, JR.; CLIFFORD MOQUINO, individually and in their official capacities as Tribal Councilors of Tesuque Pueblo; DUANE SILVA, individually and as an officer of Tesuque Pueblo; TESUQUE TRIBAL COURT; TESUQUE TRIBAL CONTRACTORS, 1-10,

Defendants-Appellants-
Cross-Appellees.

Nos. 04-2305
04-2310

JICARILLA APACHE NATION; THE NAVAJO NATION; THE UTE MOUNTAIN UTE TRIBE; THE PUEBLO OF ACOMA; THE PUEBLO OF COCHITI; THE PUEBLO OF ISLETA; THE PUEBLO OF JEMEZ; THE PUEBLO OF LAGUNA; THE PUEBLO OF NAMBE; THE PUEBLO

OF SANDIA; THE PUEBLO OF SAN JUAN; THE PUEBLO OF SANTA ANA; THE PUEBLO OF SANTA CLARA; THE PUEBLO OF SANTO DOMINGO; THE PUEBLO OF ZIA,

Amici Curiae.

ORDER

Filed June 4, 2006

Before **TACHA** Chief Circuit Judge, **EBEL**, Circuit Judge, and **CASSELL***, District Judge.

Appellee/Cross-Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ Audrey F. Weigel
Deputy Clerk

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* Honorable Paul G. Cassell, District Judge, United States District Court for the District of Utah, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DON WALTON,

Plaintiff-Appellee-
Cross-Appellant,

v.

TESUQUE PUEBLO; TESUQUE PUEBLO FLEA MARKET; MARVIN HERRERA, individually and in his official capacity as Governor of Tesuque Pueblo; CLARENCE CORIZ; NORBERT LENO; MICHAEL ALBERT VIGIL; HAROLD SAMUEL; GARY MOQUINO; ALLEN DURAN; ROBERT DORAME, JR.; CLIFFORD MOQUINO, individually and in their official capacities as Tribal Councilors of Tesuque Pueblo; DUANE SILVA, individually and as an officer of Tesuque Pueblo; TESUQUE TRIBAL COURT; TESUQUE TRIBAL CONTRACTORS, 1-10,

Defendants-Appellants-
Cross-Appellees.

Nos. 04-2305
04-2310

JICARILLA APACHE NATION; THE NAVAJO NATION; THE UTE MOUNTAIN UTE TRIBE; THE PUEBLO OF ACOMA; THE PUEBLO OF COCHITI; THE PUEBLO OF ISLETA; THE PUEBLO OF JEMEZ; THE PUEBLO OF LAGUNA; THE

PUEBLO OF NAMBE; THE PUEBLO OF SANDIA; THE PUEBLO OF SAN JUAN; THE PUEBLO OF SANTA ANA; THE PUEBLO OF SANTA CLARA; THE PUEBLO OF SANTO DOMINGO; THE PUEBLO OF ZIA,

Amici Curiae.

ORDER

Filed June 14, 2006

Before **TACHA** Chief Circuit Judge, **EBEL**, Circuit Judge, and **CASSELL***, District Judge.

The order entered June 14, 2006, inadvertently had the filed date of June 4, 2006. This complete copy of the order is entered nuns pro tunc showing the correct date of June 14, 2006.

Appellee/Cross-Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular

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* Honorable Paul G. Cassell, District Judge, United States District Court for the District of Utah, sitting by designation.

active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/ Audrey F. Weigel
Deputy Clerk

MEMORANDUM

TO: Monthly Reserved Vendors
FROM: Duane Silva, 2002 General Mgr.
DATE: Sunday, November 10, 2002
RE: Follow up Memo, New Information, Updates, & Changes

I. Follow up to all the questions about December 2002. At the beginning of the year we had previously calculated the rent for the month of December 2002 as follows: 10 days @ $15.00 = $150.00, but we are only requiring $145.00 per space for December. Therefore, since we are planning to stay open for that extra week of December 20, 21, and 22, 2002, we will not be charging reserved vendors who are paying the full amount of $145.00 for December rent.

II. *Spaces*:

- We will be extending rows East A & East B. They will become full rows down to about space 56. Therefore, first priority will be given to reserved vendors in row A or B who desire to move to a space on row East A or East B and we will be asking those vendors to please come by the office and fill out a request form by Sunday, November 17, 2002. After that, any other reserved vendor will have till Sunday, November 24, 2002 to fill out a request form. If no one has made any request I will then go threw the waiting list of approximately 40-50 new requests to become a reserved vendor.

- All current space(s) not occupied will remain open to be used for daily vending.

- All vendors who were placed into covered or non-covered spaces **"for this season only"**, will be relocated to another available space because

those vacated spaces will be used for daily vending.

III. At the beginning of the season we had requested for every reserved vendor to carry a fire extinguisher. Beginning on today, November 10, 2002 the grounds personnel will be inspecting all booths and handing out citations for: 1) expired extinguisher, 2) no extinguisher or 3) insufficient extinguishers. By the request of our Insurance Agent, vendors are required to have a fire extinguisher for every booth space (ex: 1 space – 1 extinguisher; 2 spaces – 2 extinguishers; etc. . . .).

IV. Any Reserved Vendor who has or is giving up their space for the season, will not be consider for future space expansion.

V. The Flea Market Rules and Regulations have been renamed Rules & Regulations for Flea Market Vendors. We have deleted material in part IV. Procedures, page 10 & 11 pertaining to Administrative Hearings. We will also be deleting and adding changes to other sections of the rules and regulations.

VI. Please be advised that the flea market will not tolerate any vendor sending letters to the Tribal Council, or harassment of flea market employees thereafter, any vendors do such will be removed and banned from the Flea Market. New week I will be asking to meet with the Tribal Council, at that time I will go over the following: 1) the Rules & Regulations and the Resolution signed by the 1998 Tribal Council; 2) possible vendors who may be banned from the flea market; and 3) changes for the 2003 season. For those vendors who are unhappy with Native Americans or the Pueblo of Tesuque taking over the flea

market I suggest that you go elsewhere where racisms is tolerated!

[LOGO] Route 5 Box 360-T [LOGO]
Santa Fe, New Mexico 87501

Cell: (505) 660-8948
Fax: (505) 982-2331

FLEA MARKET VOLUNTARY STATEMENT

Type of Incident: RACIST HARRASSMENT (specify)
Report No.: ___

Date: ___, 20__ Time of Day: ___ AM or PM (circle one)

Name: BIG DON D.O.B.: ___ SS#: ___

Address: _____ Phone – Day #: _____
Evening: _____

Vehicle – Make or Model: _____ Color: _____
License #: _____

Location of Incident: TESUQUE FLEE MARKET Row: C
Space #:3J

NATURE OF STATEMENT:

He is big alright! Physically, that is. Mentally he is very small. His income at C35-6 is very limited. He sells license plates now and then and plays backgammon with his friends. That's all. For years now, when I sell a rug or two, Big Don would go into jealousy mode and would walk up and down the row. He would give me dirty looks and would say, "you are the one who made money today." I could see that Big Don would be upset for days. I learned to tolerate and ignore him. Why? Not because he is big and

dreadful like his ego makes him to believe, but because by nature, he is a rumorist and gossipist. But because I would be embarrassed to get into an argument with a person like that, and would be embarrassed if my friends in the pueblo, young and old, would hear of such an argument.

On May 4th, Big Don pushed the wrong button this time. He started to harrass me by making racist remarks. He accused me of being an enemy of this country. He said that I "was laughing because Iraqis were throwing bullets to American soldiers instead of flowers." Also that the only reason I'm here in the country is to "make money." He was spreading the word up and down the row. I could not tolerate him any longer. I have a son in the military and am willing to sacrifice him, or for that matter myself, for this country – if necessary, sparing only my wife and daughter. I couldn't tolerate an insult and a harrassment of this scale. I regret to say that if he continues to behave with this kind of unacceptable racism, I will take him to court to see that he suffers the consequences of being a blue blooded racist. Again I regret to declare that if Big Don, because of some ignorant and racist reasons, decides to become physical I may have to hurt his bones. Therefore I will kindly present my apologies in advance to my friends on the pueblo, young and old.

/s/ Ismail Abayhan
May 11, 2003

[LOGO] P.O. Box 170 [LOGO]
Tesuque, NM 87574
Office: (505) 995-8626
Fax: (505) 995-9922

Sunday, May 18, 2003

Don Walton
2013 Pinon St.
Santa Fe, NM 87574

Re: Eviction

Dear Mr. Walton:

The Pueblo of Tesuque and the Tesuque Pueblo Flea Market will not tolerate racisms, we as Native American's believe we are here to co-exist and live in harmony with different races and cultures.

When you went before the Tribal council of 1999 and talked to them about being the representative for other vendors, you were told by the council that any other infraction caused by you would be grounds for eviction of the flea market.

Due to you actions of racism to a fellow vendor, and in order to keep peace here at the flea market, I have no other choice but to revoke your permit and order an eviction on this Eighteenth day of May Two-thousand and three. According to the Rules and Regulations under Part II, STANDARDS OF VENDOR CONDUCT; 16. *NUISANCES*: The Vendor shall not knowingly encourage, create, perform, or maintain a Nuisance within the Flea Market.

You are now required to start clearing out you booth today, Sunday, May 18, 2003, and will have until 5:45 pm

to do so. If you are not finished by 5:45 pm you will be allowed in the Flea Market tomorrow, Monday, May 19, 2003 and will have till 3:00 pm. If you are not finished by 3:00 pm any property left on the flea market will be become the property of the Tesuque Pueblo Flea Market.

Sincerely

/s/ Sherwin Duane Silva
General Manager

Cc: Governor Marvin Herrera and Tribal Council
Gary Moquino, Tribal Sheriff
Robert Frenier, Chief of Police

IN THE TESUQUE PUEBLO TRIBAL COURT

DON WALTON,

Plaintiff,

vs. No. CV-03-137

TESUQUE PUEBLO, TESUQUE PUEBLO FLEA MARKET, DUANE SILVA, and ISMAIL ABAYHAN,

Defendants.

DEPOSITION OF ISMAIL ABAYHAN

September 13, 2004
10:25 a.m.
Nordhaus, Haltom, Taylor, Taradash & Bladh, LLP
1239 Paseo de Peralta
Santa Fe, New Mexico 87501

PURSUANT TO AGREEMENT OF COUNSEL, this deposition was:

TAKEN BY: MR. ERIC TREISMAN
Attorney for the Plaintiff

REPORTED BY: Jan A. Williams, RPR, CCR 14
Bean & Associates, Inc.
Professional Court Reporting Service
500 Marquette, Northwest, Suite 280
Albuquerque, New Mexico 87102

[4] ISMAIL ABAYHAN

after having been first duly sworn under oath, was questioned and testified as follows:

EXAMINATION

BY MR. TREISMAN:

Q. State your name please for the record.

A. Ismail Abayhan.

* * *

Q. What's your native country?

A. Turkey.

Q. Are you a Turkish citizen?

A. Yes.

Q. Now, what is your ethnicity?

A. Caucasian.

Q. Caucasian. What is your native language, [5] Turkish language?

A. No, it's Chechen, dialect of Chechen.

* * *

[14] English and worked there for four years I believe.

And then I took a long vacation, built a boat, a small boat, and fished for three months. Then decided to work again, applied to the Iranian Consulate. And they hired me as a secretary for the consulate general.

But the job was not secretary, it was just translating in English to Turkish for the statements of political stuff. And I translated to Turkish and published it in the local newspapers. So that was the job.

Q. And where was the consulate?

A. Trebizond.

Q. Trebizond?

A. Yes.

Q. That's where you're from?

A. I'm not from Trebizond, but that's where I was working at that time at Turkish Airlines. And then I fished the Black Sea for three months. And then I worked for the Iranian Consulate over there for two years, the first half for the Shah and the second for the Khomeini.

Q. Did you get a raise?

A. No, on the contrary.

* * *

[17] Q. Let me cut to the chase, although I will come back and cover everything else. But do you feel that everything happened right in this episode that we're litigating today?

A. No, nothing happened right. Everything happened wrong.

Q. And elaborate on that, if you would, please.

A. How do you mean elaborate?

Q. Well, of course, we feel a wrong is done because we've gone to court to rectify a wrong.

A. I know, you started it. But tell me more.

Q. I'm here to have you tell me your side today. You will hear my side at length.

A. All right.

Q. When you say everything was done wrong, I'm not interested in all the things that you feel Mr. Walton did wrong. I'm sure you've got a lengthy list of those. I'd like to know if you feel that anything was done wrong to Mr. Walton, that's the heart of my question to you?

A. He shouldn't be kicked out of the flea market because of this incident. And it was their decision. So it wasn't my decision, I never requested. We've been fighting for bread in the same places, in the same market for years. So why would I ask them to

* * *

[30] Q. Had you ever discussed with Don your efforts to gain citizenship?

A. I don't remember.

Q. Had you ever discussed with him your Chechen ethnicity or your Turkish nationality?

A. Probably on some occasion. We used to even live together in Camel Rock RV camp for a year. We had many conversations along the years, but I don't remember right now what they were. We even sit in the pool, jacuzzi together for hours in the Camel Rock RV [31] camp and talk, but I don't remember what we talked about.

Q. Do you recall ever expressing either satisfaction or – first of all do you ever remember expressing satisfaction to your fellow vendors that Don was no longer at the flea market?

A. No, I never have.

Q. Have you ever told anyone before today about your dissatisfaction and your feeling that he was improperly expelled from the flea market?

A. I have said to a lot of people that I didn't know they were going to kick him out. I'm sorry they did I have said many times, yes.

* * *

[32] Q. You characterized the incident for your volunteer statement as one of racist harassment. And you have told me today that your racial and ethnic background is Caucasian. Do you feel that you were harassed as a Caucasian by Mr. Walton?

A. No. I was – but it came out to that. It was my opinion that he did that. What else he would say you're the enemy of this country. What's the reason. If there is any reason, help me out. This is my opinion, I wrote it in there.

Q. What is your basis for your statement that he is dreadful?

A. Well, the way he walks around, you know, he's [33] almost seven feet. But, when he's angry, he pretends to be seven feet. And like, you know, the front license plate on his truck, Big Don becomes bigger when he's angry, you know.

Q. Did you have any basis for the statement that he is a racist other than what you've just told me?

A. The way he behaved was my opinion that he was a racist.

Q. Towards you or towards the world in general?

A. Towards me, towards me. I don't have nothing to do with his world. But toward me.

Q. But you say there was never any incident or hostility before?

A. No.

* * *

Q. Did you ever hear Mr. Walton make ignorant [34] and racist remarks and, if so, what were those?

A. Well, it's right there. He made it to me.

Q. And that's the only basis for that statement?

A. Yes, sir.

Q. And did Mr. Walton ever say to you that he may have to hurt your bones?

A. No.

Q. Are you aware of him ever saying to anybody else the he may have to hurt your bones?

A. No.

* * *

[36] Q. Did you ever consider the possibility that Don might be expelled from the flea market?

A. After giving this to the management or before or how was your question?

Q. Ever.

A. That he would be expelled from the –

Q. Yes.

A. No.

Q. You never thought about the possibility?

A. I never thought about it. I was hoping that they would stop harassing me, him stopping harassing me. And that was the only intention.

* * *

[37] Q. What about the underlying episode, do you even remember that, the one where you were making some form of commentary shortly after the invasion of Iraq, in the first day or two or three, do you remember that episode?

A. I remember that episode, yes.

Q. Tell me about that.

A. I heard previously, the day before – I watch [38] six news channels a day besides the paper. I've got two dishes. And there was an interview between, if you remember, foreign minister of Saddam Hussein.

Q. Tariq Aziz?

A. Tariq Aziz. And this fellow from CNN I believe it was, he asked a question, he said to Tariq Aziz, now that Americans are coming to Baghdad, your people to Bagdad,

when they get there, they're going to throw flowers at the American soldiers.

Q. Tariq Aziz said that?

A. No, the reporter said that. And what are you going to do then asks to Aziz. And Tariq Aziz says they're not going to throw flowers, they're going to throw bullets. And I laughed to myself for that ignorant question at home.

When I get to the flea market, of course, I talk to everybody. You know what I heard last night, somebody was asking Tariq Aziz that the Americans – when the Americans come to Baghdad, they're going to throw flowers at them. I still laugh today, Mr. Treisman. I'm sure you do too.

And it was funny. I discuss it with many of them. After a week of thinking, that was the episode that he's talking about. I didn't tell one or two or three people, I told everybody because it was the most [39] stupidest question I have ever heard.

And previously, watching the European channels, I see Saddam Hussein asking his people, urging them in his own way that we are not match to American technology, we won't take him out in the open. When they come into the cities, we'll kill them one by one.

And that's what he saying to his people. And that's what Tariq Aziz was saying that's what everybody was saying. And to me it was very stupid question, why a reporter asking a man that your people are going to throw flowers at us.

Q. You talked about that with how many people would you estimate?

A. I don't know, however people that day, I don't know how many people I talked to. You know, whatever the subject came, that's what I said.

Q. Now, why did you assert that Mr. Walton is a rumorist?

A. Well, knowing him, you know, over the years, he always likes to talk, says so and so said this, so and so said that.

Q. And is this essentially different from what you were doing?

A. I don't gossip. You and I get together in [40] the morning, we see each other 15, 20 minutes, we talk about a few things, politics, weather. I don't go around spreading rumors, so and so said this and so and so said that.

Q. Okay. Did you ever hear Mr. Walton make disparaging remarks about various ethnicities?

A. No.

Q. Do you agree with me that the episode is a somewhat thin basis to accuse a man of being a racist?

A. No, it's not very thin, sir. It's very thick. I don't like to be called enemy of this country.

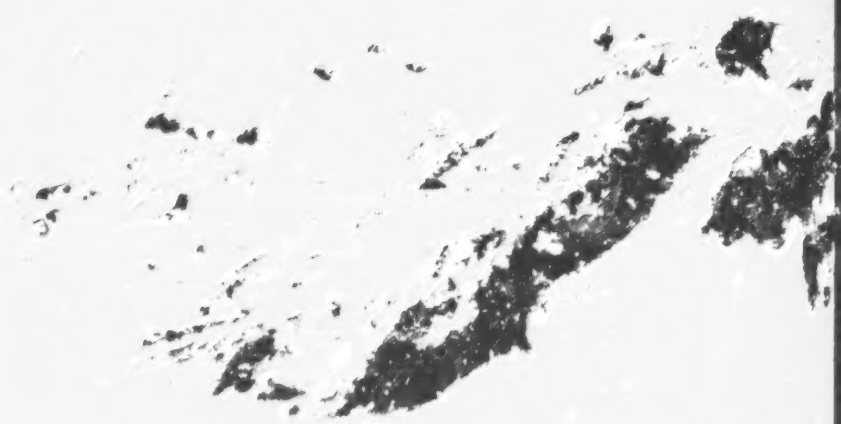
Q. Is that a racial characterization in your opinion?

A. I think so, because of my religion. Official – what else could there be? Is there any other reason?

Q. One may be he was offended at your remarks about the CNN reporter. Is that possible in your opinion?

A. There should be more, because he wouldn't come and accuse me and start harassing me just because of that. There must be other reasons. And, if you tell me, I would be very happy.

* * *



[LOGO] *Pueblo of Tesuque*
Route 42 Box 360-T
Santa Fe, New Mexico 87506

December 19, 2003

Mr. Eric Treisman
460 St. Michael's Drive
Suite 402
Santa Fe, NM 87505

RE: Walton v. Pueblo of Tesuque

Dear Mr. Treisman:

This letter is to clarify an important matter that was raised in our telephone conversation yesterday regarding your client, Don Walton. On May 18, 2003 Mr. Walton's business "Big Don's" was evicted from operating a booth at the Pueblo of Tesuque Flea Market. Mr. Walton was asked to cease doing business at the Flea Market as a vendor.

The letter notifying Mr. Walton of his eviction does not mention the word banishment. The Pueblo of Tesuque Tribal Council is the only governmental body that is vested with the authority to banish an individual from entering the boundaries of the Pueblo. Agents and employees of the Pueblo do not have the power to banish. At no time was Mr. Walton ever banished from the Pueblo of Tesuque by the Tribal Council in the form of a letter or Court Order. Mr. Walton may enter the Pueblo, provided the Pueblo is open to the public, and he may patron the Camel Rock Casino, and he is free to traverse the Pueblo on public roadways and highways. If Mr. Walton, hypothetically, causes a disturbance, or violates any laws or regulations while on the Pueblo, the matter will be handled by law enforcement and he will be treated fairly in

conformity with the laws and customs of the Pueblo and the State of New Mexico. I do not anticipate that there will be any problems while this case is pending.

Furthermore, the flea market closed due to the reconstruction of U.S. Highway 84/285 and is unrelated to the action you filed in Tribal Court. Please reconsider your position in light of this notice and information from my client, the Pueblo of Tesuque.

Sincerely,

/s/ J. Marvin M. Herrera
Governor J. Marvin Herrera

/s/ Sharon Pomeranz
Sharon Pomeranz

Phone (505) 983-2667 *Fax (505) 982-2331*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DON WALTON,

Plaintiff,

v. **No. CIV-04-236 LFG/WDS**

TESUQUE PUEBLO, TESUQUE PUEBLO FLEA MARKET, MARVIN HERRERA, individually and in his official capacity as Governor of Tesuque Pueblo; CLARENCE CORIZ, NORBERT LENO, MICHAEL ALBERT VIGIL, HAROLD SAMUEL, GARY MOQUINO, ALLEN DURAN, ROBERT DORAME JR., and CLIFFORD MOQUINO, individually and in their official capacities as Tribal Councilors of Tesuque Pueblo; and DUANE SILVA, individually and as an officer of Tesuque Pueblo, TESUQUE TRIBAL COURT, and TESUQUE TRIBAL CONTRACTORS 1-10,

Defendants.

AFFIDAVIT OF DON WALTON

1. I am the Plaintiff in this action. All this averments in the verified complaints in this court and in the tribal court are true except for the matters on information and belief as to which I am so informed and so believe.

2. The flea market at Tesuque Pueblo was my livelihood for fourteen years through my eviction and banishment. Flea market season begins in March when the vendor's permits are purchased from the Pueblo, and monthly rent is paid through November. I largely spend my winter months preparing for the season and I have no other occupation. For two years when I was

the flea market handyman and groundskeeper I lived there year round.

3. The vendor's permit is a valuable license. There were four hundred principal vendors holding vendor's permits last season, most of them employing several persons in their operation with very few that did not employ at least two. It is safe to estimate 1,200 persons gainfully employed at the flea market and many times the number passing through. The flea market is the ideal venue for my craft and there is nothing else like it in New Mexico. I am not a carpenter as the same is licensed in New Mexico but I make all sorts of wooden products short of permanent structures. I constructed my booth and all the wooden booths at the flea market.

4. I worked at the Pueblo fourteen years, I lived on the territory the Pueblo for seven of those years, and my life was bound up with the Pueblo of Tesuque probably as much as possible for any non-Indian who doesn't marry in. I have made things for people's houses and eaten in those same houses. My customers and friends are there.

5. In 2002 there was an abrupt change of management at the flea market. Outgoing Pueblo governor Paul Swazo believed he would become the manager but instead he was fired and replaced by Duane Silva as acting manager per memos to vendors attached to this affidavit as composite exhibit 1, distributed to us by management and kept by me in the regular course of my business.

6. I believe Duane Silva was an Indian but a non-Tesuque who married into the tribe. As I knew him and as demonstrated by the attached memos to vendors, Defendant Silva was frustrated and insecure in

his position, highly sensitive to what he perceived as "racisms" which he proposed to punish.

7. When I received the memo in which he threatened to punish vendors exhibiting "racisms" I did not know what he was talking about and I certainly had no sense it applied to me. I have exhibited no "racisms" towards Tesuques or anyone else. I have eaten at their tables and I respect them, and it is with respect that I hold them to respect due process.

8. About the time of the "racisms" memo US forces engaged in Iraq. A neighboring vendor was laughing and joking about troops expecting flowers and receiving bullets. I have no use for anyone who laughs at our troops under fire and I gave him the silent treatment after that. I later learned that he complained about me to Defendant Silva and that gave rise to the letter evicting me.

9. Defendant Silva served me with the letter subject of this litigation out of the blue as far as I was concerned, finding me guilty of racism and maintaining a nuisance and evicting me without a hearing. On hindsight I believe he was trying to eliminate me because he perceived me as a person who might be considered as a manager. Mr. Silva is no longer with the flea market.

10. I always understood that anyone evicted from the flea market was banned from Tesuque Pueblo. That did not seem right to me where I had done no wrong and hadn't had any hearing. Further I have friends and customers at the Pueblo from whom it is not right that I be separated. Therefore I called the chief of police of the Pueblo, with whom I am well acquainted, who was aware of the situation. I asked him if I might come to the Pueblo to visit.

11. He did not give me an affirmative or negative response immediately but said he would make a couple of calls first to make sure and get back to me. Later he called me to report that he had made his calls and determined that I might come to the Pueblo to visit. But when I did so I was immediately stopped by security, escorted to my vehicle and told to leave the territory of the Pueblo as anyone evicted from the flea market is banned.

/s/ Don Walton
Don Walton

STATE OF NEW MEXICO

COUNTY OF SANTA FE

SUBSCRIBED AND sworn to before me by Don Walton this day 21st day of April, 2004.

/s/ Sandra Gallegos
Notary Public

My Commission Expires: 11-7-06

UNITED STATES COURT OF APPEALS
FOR THE TEN CIRCUIT

DON WALTON,

Plaintiff-Appellee-
Cross-Appellant,

v. **Nos. 04-2305 & 04-2310**

TESUQUE PUEBLO, et al.,

Defendants-Appellants-
Cross-Appellees

DECLARATION OF DON WALTON

1. My understanding that any vendor expelled from the flea market is banned from Tesuque Pueblo is the common understanding among flea market vendors.

2. Furthermore it was explicitly stated to me by Pueblo security who escorted me off the Pueblo when I came back after being expelled the first time that Duane Silva, the flea market manager, had permanently banned me.

3. I am aware of a number of vendors who have been expelled from the Flea Market for crimes against the Pueblo, such as being named on my witness list. I know of at least two vendors apart from myself who have sought to return to the Pueblo. I do not know of any expelled vendor who has ever been allowed to return.

4. Tesuque law derives from unwritten as well as written sources. In my experience, unwritten law controls.

5. The permanent chief executive of Tesuque Pueblo is the cacique, who annually appoints a nominal governor. The governor's limited authority ends with his one

year term. Flea market manager is a more powerful and permanent position in the Tesuque Pueblo hierarchy.

6. Sharon Pomeranz' employment as counsel to the Pueblo ended a few weeks after she wrote the letter at App 035 and her signature on a letter gives me no assurance whatever.

7. The signature of the 2003 governor on the letter at App 035 gives me less assurance than the assurance of the Tesuque Pueblo chief of police, who is still in office, whose assurance was ineffectual.

8. I provided security at the Flea Market for two years before and six months after the Pueblo took over direct management from Trader Jack. I lived at the Flea Market and I was on call 24/7. Pueblo security and tribal police know me from that time and they know my vehicle.

9. My privilege to attend court proceedings does not extend to any other activity on the Pueblo. The tribal court declined to rule on my exclusion. My exclusion remains a severe actual and potential threat to my liberty.

10. If this matter is remanded to the district court for factual elucidation the foregoing testimony will be buttressed by others including Tesuque Pueblo witnesses.

/s/ Don Walton
Don Walton

STATE OF NEW MEXICO

COUNTY OF SANTA FE

SUBSCRIBED AND sworn to before me by Don Walton this day 12 day of October, 2005.

/s/ Sandra Gallegos
Notary Public

My Commission Expires: 11-7-06

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DON WALTON,

Plaintiff,

v. **No.**

TESUQUE PUEBLO, TESUQUE PUEBLO FLEA MARKET, MARVIN HERRERA, individually and in his official capacity as Governor of Tesuque Pueblo; CLARENCE CORIZ, NORBERT LENO, MICHAEL ALBERT VIGIL, HAROLD SAMUEL, GARY MOQUINO, ALLEN DURAN, ROBERT DORAME JR., and CLIFFORD MOQUINO, individually and in their official capacities as Tribal Councilors of Tesuque Pueblo; and DUANE SILVA, individually and as an officer of Tesuque Pueblo, TESUQUE TRIBAL COURT, and TESUQUE TRIBAL CONTRACTORS 1-10,

Defendants.

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS AND PETITION FOR WRIT OF HABEAS CORPUS

JURY TRIAL DEMAND

1. Plaintiff demands trial by jury of twelve of any and all issues so triable.

PARTIES

2. Plaintiff Don Walton is a non-Indian citizen of the United States.

3. Defendant Tesuque Pueblo is a federally recognized Indian tribe of six hundred ninety six members with a thirty square mile reservation immediately north of, adjacent to and contiguous with the city of Santa Fe, New Mexico. It is a theocracy with *a cacique* or chief religious officer retaining executive, legislative and judicial authority.

4. Defendant Tesuque Pueblo Flea Market is a business venture of Defendant Tesuque Pueblo, abutting the Santa Fe opera on US Highway 84/285.

5. Defendant Marvin Herrera is the governor of Tesuque Pueblo. Defendants Clarence Coriz, Norbert Leno, Michael Albert Vigil, Harold Samuel, Gary Moquino, Allen Duran, Robert Dorame Jr., and Clifford Moquino are the tribal council of Defendant Tesuque Pueblo. Duane Silva is an officer of Tesuque Pueblo who exercises the power of banishment. All the individual defendants named are sued individually and in their official capacity. On information and belief each one of them was acting within the scope of employment, and alternatively on information and belief each one of them was acting outside the scope of employment.

6. Defendant Tesuque Tribal Court is an agency of Tesuque Pueblo operating pursuant to a contract with the United States of America under the Indian Self Determination and Education Assistance Act ("ISDEAA"), 25 USC 450ff. Defendants Tesuque Tribal Contractors 1-10 are other agencies or entities of Tesuque Pueblo contracting pursuant to ISDEAA and complicit in the torts and deprivations of due process hereinafter set forth. Defendant Tesuque Tribal Contractors 1-10 are fictitiously named

and leave is sought to substitute the true names of the said defendants when the same shall be determined.

7. The Defendants and each of them in each of the allegations in the counts hereinafter set forth maliciously and invidiously discriminated against Plaintiff because of his Anglo ethnicity.

JURISDICTION

8. This matter arises and this Court has jurisdiction pursuant to Article I sections 8 and 9, Article III section 2, Article IV section 2, Article VI and Amendment 5 of the United States Constitution; 25 USC 1301 to 1303 (Indian Civil Rights Act); 28 USC 2241 et seq. (habeas corpus); 42 USC 1981, 1985 and 1988 (civil rights, attorney's fee); 25 USC 450f(c)(1) (ISDEAA contractors required to maintain insurance and waive sovereignty defenses); and 28 USC 1331, this matter arising under the laws and statutes of the United States. The Court's pendent jurisdiction and jurisdiction pursuant to 42 USC 1988(a) is invoked as to non-federal causes.

STATEMENT OF FACTS COMMON TO ALL COUNTS

9. For over fourteen years, Plaintiff Don Walton has been a vendor of handmade wooden products at the Defendant Tesuque Pueblo Flea Market, formerly Trader Jack's (hereinafter "Flea Market.") At all times pertinent it was his principal livelihood.

10. During much of that time Plaintiff made his home on the territory of Tesuque Pueblo. For years he lived in the Tesuque Pueblo mobile home park. He was living at Trader Jack's Flea Market providing caretaker

and handyman services when the Trader Jack lease expired in July, 1998 and stayed on in that capacity at the request of the Pueblo through early 1999. His friends and social connections as well as clients for his woodworking are within the Pueblo.

11. Vendors contract with Tesuque Pueblo Flea Market on an annual basis, purchasing an annual Vendor's Permit which permits them to occupy a Vendor Space at the Flea Market for one year. Rental is paid monthly.

12. Tesuque Pueblo Flea Market Rules and Regulations ("the Rules") were by adopted by Tribal Resolution No. 1999-03-03, March 15th, 1999, Revised, January 2002, attached hereto as Exhibit "A" and incorporated as though fully set forth here.

13. Plaintiff purchased a 2003-2004 Vendor's Permit securing his Vendor's Space through March, 2004. Plaintiff paid his monthly rental on time and in full and fully abided by the Rules.

14. In May, 2003, without notice or hearing, Defendant Silva on behalf of all Defendants served Plaintiff with Exhibit B, incorporated as though fully set forth here, evicting Plaintiff and revoking his 2003-2004 vendor's permit.

15. Exhibit B purports to evict Plaintiff for nuisance, defined in the Rules per New Mexico state law, but no nuisance is alleged. The specific allegations in Exhibit B are uniformly false: the vendor who went to the Tribal Council in 1999 was not Plaintiff but vendor Forrest Broadley, nor did Plaintiff ever exhibit "racisms (sic) to a neighbor."

16. Exhibit B fails to comply Part IV, section 2 of the Tesuque Pueblo Flea Market Rules & Regulations providing for notice and hearing, which is also required for substantive and procedural Due Process pursuant to the Indian Civil Rights Act of 1968, 25 USC 1301-1303, as well as the Fifth Amendment to the Constitution of the United States.

17. In July, 2003, when Plaintiff went to the Pueblo, he was forcibly removed from the premises by Pueblo security and advised that Defendant Silva had permanently banished him from the entire Pueblo.

18. Besides the Flea Market, the popular Camel Rock Casino and other establishments, the Pueblo contains the homes of Plaintiff's friends and customers.

19. The only route north out of Santa Fe crosses the Defendant Pueblo, patrolled by Defendant Pueblo law enforcement.

20. Banishment from the thirty square mile jurisdiction capping Santa Fe to the north is a form of detention and works a severe infringement of Plaintiff s liberty and freedom of movement as well as his freedom of association and right to livelihood.

21. The charges are pretextual, Plaintiff having been selected at random from among the Anglo vendors not because of anything he did but to counter perceived dissatisfaction among and insubordination of vendors, to crack the whip and demonstrate control.

22. Defendant Tesuque Pueblo is a theocracy. It does not have separate legislative, judicial, and executive functions. The court of last resort is a tribal council appointed by the Cacique or religious leader. Defendant

Tesuque Pueblo does not consider its sovereign immunity waived or limited by the Bill of Rights of the United States Constitution or by the Indian Civil Rights Act of 1968.

23. Defendant Tesuque Tribal Court is an arm of the theocracy subject to the superintending control of the Tesuque Tribal Council, hence to the religious leader. It is not and cannot be an independent judiciary as the same is known in American jurisprudence.

24. In its own name or as Defendant Tesuque Pueblo, Defendant Tesuque Tribal Court operates pursuant to an ISDEAA contract containing the provisions mandated by 25 USC 450f(c)(1), providing for liability insurance and waiver of sovereign immunity defenses.

25. Plaintiff sought his tribal remedy by filing the action styled *Walton v. Tesuque Pueblo*, No. CV-03-137 in the Tesuque Tribal Court.

26. Plaintiff was denied any form of discovery.

27. When Plaintiff named other vendors as witnesses pursuant to the Tesuque Tribal Code, Defendants evicted those vendors, without cause, solely to punish them and deprive Plaintiff of their testimony.

28. On October 22, 2003, the Tesuque Tribal Council passed unanimous Resolution #10/102-1022, a bill of attainder declaring that *Walton v. Tesuque Pueblo, No. CV-030137* is barred. The Resolution is attached as Exhibit C.

29. On February 13, 2004, the Tribal Court dismissed Plaintiff's action as barred, without consideration of merits, giving no effect to the Indian Civil Rights Act, the duly adopted Rules and Regulations of the Tesuque

Tribal Flea Market, or traditional Tesuque tribal due process.

30. On February 23, 2004, Plaintiff appealed to the Pueblo of Tesuque Court of Appeals, which denied without hearing on February 25, 2004.

31. Plaintiff has exhausted tribal remedies.

COUNT ONE – PETITION FOR WRIT OF HABEAS CORPUS

32. Plaintiff realleges each and every allegation hereinabove.

33. Defendants and each of them have subjected Plaintiff to custody, detained him and interfered with his right to liberty and freedom of movement guaranteed by the Constitution of the United States and 25 USC 1302 in that they arbitrarily, coercively and forcibly, without cause and without due process of law, notice, hearing or the right to call witnesses banished him from the territory of Tesuque Pueblo.

34. Pursuant to Article I section 9 of the Constitution, to 25 USC 1302, 1303, and to 28 USC 2241 *et seq.* Plaintiff petitions this Court for a Writ of Habeas Corpus directed to the Defendants and each of them requiring that they restore his liberty forthwith.

COUNT TWO – CIVIL RIGHTS – DAMAGES FOR DEPRIVATION OF LIBERTY

35. Plaintiff realleges each and every prior allegation.

36. In violation of 42 USC 1981 and 1985 Defendants and each of them, both individually and in their official capacities, conspired to directly or indirectly deprive Plaintiff of equal protection of the laws and of equal privileges and immunities under the laws, specifically the right to liberty secured by the Fifth Amendment to the Constitution of the United States, the Indian Civil Rights Act of 1968, 25 USC 1301-1303, and the Civil Rights statutes, 42 USC 1981 to 1988.

37. In the event the laws of the United States are not adapted to the object or deficient in the provisions necessary to furnish suitable remedies, Plaintiff is entitled to common law and State law relief pursuant to 42 USC 1988(a).

38. Plaintiff has incurred attorney's fees in this action to be allowed as costs against the Defendants pursuant to 42 USC 1988(b) inclusive of expert fees pursuant to 42 USC 1988(c).

COUNT THREE - CIVIL RIGHTS - DAMAGES FOR DEPRIVATION OF PROPERTY

39. Plaintiff repeats and realleges each and every allegation hereinabove.

40. Plaintiffs Vendor's License and right to a Vendor's Space is a property interest protected by the Indian Civil Rights Act of 1968, 25 USC 1302, by the Fifth Amendment to the Constitution of the United States, and by 42 USC 1981, 1985, and 1988, of which Plaintiff may not be legally deprived without just compensation and due process of law.

41. The acts of Defendants as set forth hereinabove deprive Plaintiff of property without due process of law and violate his rights under the statutes set forth in Paragraph 33, whereby his business has been destroyed and he has suffered direct and consequential damage.

42. Plaintiff is entitled to just compensation and damages in contract, condemnation, conversion, or such other federal or state cause of action or remedy as the court may fashion pursuant to 42 USC 1988(a), together with attorney's fee and expert fee pursuant to 42 USC 1988(b) and (c).

COUNT FOUR – BREACH OF CONTRACT

43. Plaintiff realleges each and every allegation hereinabove.

44. Plaintiff contracted for his Vendor's License and right to his Vendor's Space, the terms of said contract incorporating the Rules and Regulations of Exhibit A.

45. Plaintiff paid all amounts due and fulfilled all his obligations pursuant to contract.

46. Defendants and each of them breached the contract by retaining moneys paid while evicting Plaintiff without cause.

47. Defendants and each of them further breached the contract by violating the procedures in Part III, section 2 of Exhibit A, Tesuque Pueblo Flea Market Rules and Regulations, in that there was no first offense or second offense much less a third offense, and in failing to provide notice and hearing as therein provided.

COUNT FIVE – DEFAMATION

48. Plaintiff realleges each and every allegation hereinabove.

49. Defendant Silva's explicit accusations of "racisms," of "actions of racism to a fellow vendor," and of encouragement, creation, performance or maintenance of a nuisance within the Flea Market, his statement that Plaintiff appeared before and was warned by the Tribal Council 1999, and his implicit accusation of breach of the peace, are all false and defamatory

50. The defamations were republished by all Defendants and communicated to third parties

51. By reason of the defamations Plaintiff has been harmed in his trade or profession and he has suffered obloquy and hedonic damages in a sum to be proven at trial.

COUNT SIX – TORTIOUS INTERFERENCE IN BENEFICIAL RELATIONSHIP

52. Plaintiff realleges each and every allegation hereinabove.

53. Defendant Silva maliciously and tortiously interfered with Plaintiff's beneficial relationship with the other Defendants, whereby Plaintiff has been deprived of his livelihood and suffered direct, incidental and consequential damages.

COUNT SEVEN – NEGLIGENCE

54. Plaintiff repeats and realleges each and every prior allegation.

55. The acts of Defendants complained of herein, whereby Plaintiff has been damaged in a sum to be shown at trial, were negligent.

COUNT EIGHT – PRIMA FACIE TORT

56. Plaintiff realleges each and every allegation hereinabove.

57. The acts of Defendants constitute a prima facie tort, whereby Plaintiff has sustained damages in a sum to be proven at trial.

COUNT NINE – INJUNCTIVE RELIEF

58. Plaintiff repeats and realleges each and every allegation hereinabove.

59. Contemporaneously with passage of the bill of attainder against Plaintiff, Defendants closed the Flea Market. On information and belief, the closure was retaliatory for his having filed suit.

60. Plaintiff has a pecuniary and ownership interest in his business, whereby he will suffer immediate and irreparable injury absent a temporary restraining order or preliminary injunction during pendency of this action, and on final hearing a permanent injunction, enjoining revocation of his Vendor's Permit and eviction from his Vendor's Space as well as eviction of witnesses and retaliatory closure of the Flea Market.

COUNT TEN – VIOLATION OF TRADITIONAL DUE PROCESS

61. Plaintiff repeats and realleges each and every allegation hereinabove.

62. The traditional law of Tesuque Pueblo, on information and belief, is as set out by Pueblo historian Joe S. Sando in *Pueblo Nations: Eight Centuries of Pueblo Indian History* (Santa Fe: Clear Light, 1998):

> What the Pueblos have now as an unwritten 'tribal code' was essentially in operation in ancient times, remembered and obeyed as though carved in stone. The code was respected, understood, and taught from generation to generation. The oath taken by the leader in those ancient times, given then as a divine command, is still used today by the pueblo governors.
>
> Crime as we know and fear it today was nonexistent. If an offense was committed, the individual was given the opportunity to state his case; he had the benefit of witnesses and every chance to clear himself or explain himself before judgment was passed.

63. Plaintiff's right at traditional Tesuque law to the opportunity to state his case, to the benefit of witnesses and to every chance to clear himself was violated by the acts of Defendants as hereinabove alleged, to his damage in a sum to be shown at trial.

COUNT ELEVEN – OUTRAGEOUS CONDUCT AND CIVIL CONSPIRACY

64. Plainiff repeats and realleges each and every allegation hereinabove.

65. The negligent, grossly negligent, reckless, willful and wanton and intentional acts of the Defendants as hereinabove alleged constitute outrageous conduct and a civil conspiracy wherein each of the Defendants participated.

WHEREFORE, PLAINTIFF PRAYS:

(a) for a Writ of Habeas Corpus directed to the Defendants restoring Plaintiff's liberty and freedom of movement;

(b) for an injunction, enjoining Defendants from banishing and evicting Plaintiff from his Vendor's Space, revoking his Vendor's License, evicting or banishing his witnesses and closing the Flea Market;

(c) for damages in a sum to be shown at trial for negligent and intentional deprivations of liberty and property, defamation, breach of contract, tortious interference, and prima facie tort;

(d) for such punitive and exemplary damages as may be authorized, and

(e) for such other and further relief as the Court deems just, fair, and equitable.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DON WALTON,

Plaintiff,

v. **No. CIV-04-236 RB/WDS**

TESUQUE PUEBLO et al.,

Defendants.

RESPONSE IN OPPOSITION TO MOTION TO DISMISS, SUGGESTING CONVERSION TO SUMMARY JUDGMENT

[excerpt]

. . . .

II. POSTURE; CONVERSION TO MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56(f) FRCP

Plaintiff suggests conversion to Motion for Summary Judgment pursuant to Rule 56(f) FRCP. Defendant does not concur.

Defendants have filed a motion denominated as a 12(b) motion, without differentiating among subparts. It is primarily a 12(b)(1) motion testing jurisdiction with 12(b)(6) issues inextricably intertwined. For purposes of a 12(b)(6) Motion to Dismiss, facts are taken as pleaded. For purposes of a 12(b)(1) pleadings may be supplemented with public documents and matters of record, however not every extrinsic document is appropriate and the threshold for defeating a 12(b)(1) motion is very low. See generally, Wright and Miller, Vol. 5A Federal Practice & Procedure Second Edition (1990) sec. 1350.

Attached to the current motion are three extrinsic documents. The first is a self-serving document created by counsel in aid of litigation, a letter countersigned by the governor opining that Plaintiff is not banished according to proper Pueblo procedure. It is not attested and ought to be ignored by the court. If considered by the court for any purpose and not excluded, it automatically converts the motion into one for Summary Judgment under Rule 56(f). The second and third extrinsic documents are portions of the tribal court record. Plaintiff considers these documents to be of the public record character properly considered in resolution of the 12(b)(1) jurisdictional challenge, but if considered in connection with 12(b)(6) issues conversion under Rule 56(f) FRCP would again be implicated.

As frequently occurs, "the matter in question can plausibly be characterized either as going to subject matter jurisdiction or as being one of merits or procedure," RESTATEMENT (SECOND) OF JUDGMENTS s. 11, comment e; see *Da Silva v. Kinsho Intl Corp*, 229 F3d 358, 361 (2d Cir 2000). As in *Herbert v. National Academy of Sciences*, 974 F 2d 192, 198 (DC Cir 1992):

[T]hough the trial court may rule on disputed jurisdictional facts at any time, if they are inextricably intertwined with the merits of the case it should usually defer the jurisdictional decision until the merits are heard. (Citing *Land v. Dollar*, 330 US 731, 67 S Ct. 1009 (1947))

. . . .

It is an insufficient response to say, as Defendants do, that the exclusion of non-Indians has historically been a prerogative of tribes. The ICRA changed existing law. *Santa Clara v. Martinez*, 436 US 39 (1978). As a matter of fact the very first reported decision construing the ICRA

was *Dodge v. Nakai*, 298 F Supp 17 (DC Ariz, 1968), holding the expulsion by the Navajo tribe of a non-Native legal aid director violative.

Defendants submit a lawyer-drafted letter countersigned by the appointed governor in support of their contention that Plaintiff was not and could not have been banished according to Pueblo procedures. The issue of Pueblo procedure is moot. Even when Federal courts routinely assumed review under ICRA, they did not review to ensure compliance with provisions of tribal law by instrumentalities of the tribal nation except insofar as failure to comply constituted violation of federally guaranteed rights. See, eg, *Seneca Constitutional Rights Organization v. George*, 348 F Supp 51 (WDNY, 1972).

As a matter of fact, tribes lack authority to impose criminal sanctions on non-Indians pursuant to any procedure whatever; see *Oliphant v. Suquamish Tribe*, 435 US 191, 209-210 (1978). The point is that when they do so anyway, as here and as in *Oliphant*, a petition for writ of habeas corpus pursuant to 25 USC 1303 of the ICRA is the appropriate vehicle for testing the violation, again as in *Oliphant*.

The averments of the verified complaint establish Plaintiff's banishment, fleshed out in affidavit at Tab C. Regardless of the recital in the unsworn opinion letter of Defendant's house counsel that Plaintiff's banishment was not in accord with tribal procedure (with its negative pregnant that Plaintiff better mind his ps and qs if he attempts reliance on the letter), Plaintiff was escorted off the Pueblo by security who warned him not to return. Plaintiff submitted the issue to the Tesuque Pueblo tribal court, seeking relief from banishment or a declaration that

he was not banished, and the tribal court declined to give him either one.

In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F 3rd 874, cert den 519 US 1041 (CA 2, 1996), the tribe contended that banishment was civil, not criminal, but the federal court declined to accept the characterization. Permitting the tribe to avoid federal court jurisdiction by "the mere incantation of cultural relativism" would render the habeas remedy useless, said the 2d Circuit. Actual physical custody was not required to constitute a "detention." Congress could not have intended tribes to circumvent the habeas provision by "civil" banishment rather than imprisonment. Banishment is a sufficient restraint on liberty to trigger 25 USC 1303. The tribal officials alleged to be responsible for the banishment are to be considered "custodians" even though Plaintiff is not in their actual physical custody.